82-1396

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF MICHIGAN,
Petitioner,

-vs-

JESSE JAMES JONES,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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QUESTION PRESENTED

WHETHER A PRE-CHARGE STATEMENT KNOWINGLY MADE BY A DEFENDANT WHO WAS AWARE OF HIS CONTITUTIONAL RIGHTS IS INADMISSIBLE BECAUSE THE GIVING OF THAT STATEMENT WAS THE RESULT OF A PROMISE OFFERED BY PROSECUTION AUTHORITIES UPON THE SUGGESTION OF THE DEFENDANT WHERE THERE IS NO EVIDENCE OF PROTRACTED INTERROGATION OR COERCION AND THE PROSECUTION WAS WILLING AT ALL TIMES PERTINENT TO FULFILL THE PROMISE WHICH WAS MADE, AND THE DEFENDANT RETAINED AND EXERCISED HIS RIGHT AT TRIAL, TO DEMONSTRATE THE STATEMENT'S UNRELIABILITY.

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Now comes the State of Michigan, by Robert E. Weiss, Prosecuting Attorney in and for the County of Genesse, by Donald A. Kuebler, Chief Appellate Counsel, and prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Michigan filed on December 23, 1982 which reversed the respondent's conviction for first degree felony murder.

CITATIONS TO OPINIONS BELOW

The decision of the Michigan Supreme Court was filed on December 23, 1982, and is reported at 416 Mich ____ (1982); ____ NW 2d ____ (1982). That opinion reversed the unreported decision of the Michigan Court of Appeals filed on April 25, 1980. The Court of Appeals decision had

affirmed the Genesee County Circuit Court's decision of June 27, 1978 and July 5, 1978. Copies of the opinions of the courts below are included in the appendix to this petition, *infra*.

JURISDICTION

The decision of the Michigan Supreme Court was filed on December 23, 1982. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

WHETHER A PRE-CHARGE STATEMENT KNOWINGLY MADE BY A DEFENDANT WHO WAS AWARE OF HIS CONSTITUTIONAL RIGHTS IS INADMISSIBLE BECAUSE THE GIVING OF THAT STATEMENT WAS THE RESULT OF A PROMISE OFFERED BY PROSECUTION AUTHORITIES UPON THE SUGGESTION OF THE DEFENDANT WHERE THERE IS NO EVIDENCE OF PROTRACTED INTERROGATION OR COERCION AND THE PROSECUTION WAS WILLING AT ALL TIMES PERTINENT TO FULFILL THE PROMISE WHICH WAS MADE, AND THE DEFENDANT RETAINED AND EXERCISED HIS RIGHT AT TRIAL, TO DEMONSTRATE THE STATEMENT'S UNRELIABILITY.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision which the above-entitled Petition involves is as follows:

Constitution of the United States, Amendment V:

"No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or

indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF FACTS

On December 28, 1977, Thomas Chiavares was murdered at the Hockstad Pharmacy in Flint, Michigan, during the course of an armed robbery. (R 106-131; R 144-166, Trial testimony of witnesses Arthur Milliman and Timothy Lannis—Trial Transcript of June 27, 1978).[1]

Respondent Jesse James Jones was subsequently convicted for the murder of Thomas Chiavares by a jury and was sentenced to life in prison. (MCLA 750.316; MSA 28.548) The respondent's conviction depended in part on his confession which was admitted into evidence over objection of defense counsel.

Respondent appealed his conviction to the Michigan Court of Appeals and claimed that the confession made by him pursuant to a pre-charge agreement with the prosecution authorities was improperly admitted as evidence against him at his trial. The Michigan Court of Appeals affirmed the respondent's conviction in its unpublished opinion of April 25, 1980, holding that under the "totality of circumstances", the confession was properly admitted at his trial. (Appendix 28a-30a *People* v *Jones*, CA #78-3266 (Apr. 25, 1980)

Respondent was granted leave to appeal by the Michigan Supreme Court and there claimed that the confession

[1] "R" has reference to pages of the Trial Transcript of the trial held on June 27, 28 and 29, 1978.

which was given pursuant to a pre-charge plea agreement which he later refused to honor was improperly admitted at his trial. (Appendix 1a-27a)

The Michigan Supreme Court, per Kavanagh, J., and Justices Williams and Levin, in their opinion of December 23, 1982, reversed the respondent's conviction by holding that the confession was per se inadmissible under the Fifth Amendment because it was the result of a pre-charge plea-bargaining agreement even where the obtaining of that agreement was initiated by the respondent and he later refused to abide by the agreement. (Appendix 1a-11a) Justices Ryan, Coleman and Chief Justice Fitzgerald concurred in the result of reversal, but based their decision on the Michigan Rules of Evidence, MRE 410, which would exclude from evidence statements made in connection with guilty pleas and offers of guilty pleas—even though defense counsel never sought to invoke that rule to foreclose the State from introducing the respondent's confession at the trial. (Appendix 12a-27a)

Prior to his trial in the Genesee County Circuit Court, the respondent filed a motion to suppress from evidence his confession of April 28, 1978. Pursuant to that motion a testimonial hearing was conducted on June 23, 1978, showing the factual backdrop surrounding the giving of the confession in question.[2] The Fifth Amendment issue regarding the privilege against self-incrimination was thus preserved.

The police had no specific leads in the case until the respondent, Jesse James Jones, was arrested about four months later on April 27, 1978 for carrying a sawed-off shotgun on Williams Street in the City of Flint. Following that arrest the respondent spoke with Joseph L. Vince, Special Agent of the Bureau of Alcohol, Tobacco and Firearms, United States Treasury, who was interviewing

[2]The hearing was conducted pursuant to *People* v *Walker*, 374 Mich 331 (1965).

respondent with respect to the federal crime of possessing this same sawed-off shotgun as a violation of the Federal Firearms Act. During this interview the respondent embarked on a self-initiated course of seeking charge concessions from the agent. Respondent also told Agent Vince that he was willing to cooperate with Sgt. Darby of the Flint Homicide squad. Respondent requested that he be given some consideration on the Federal firearms charge if he gave information about the "Hockstad murder". (WHR 15; Appendix 47a)[3]

Joanne Weinert, the stenographer taking respondent's confessional statement, testified that respondent appeared to be physically well during the taking of the statement and that he did not have difficulty in responding during the interview conducted by Sgt. Darby. She said that there did not appear to be anything unusual about respondent and that there were no threats of any kind made to the respondent. (WHR 23, Appendix 51a)

Sgt. Elbert Darby (WHR 29, Appendix 53a) related that he had first met with respondent on April 28, 1978 at about 1:30 p.m. when respondent was in custody for the federal and state weapons offenses. (WHR 29, 30, Appendix 53a) Respondent was given his *Miranda* warnings, and upon a waiver of his rights thereunder, he commenced discussing the weapons charges. (WHR 31, 32, Appendix 54a, 55a)

During that interview respondent was told that he was a suspect in the murder case in question. Respondent was told that he still had his *Miranda* rights and he said that he would discuss the murder case because he did not know anything about it. After further discussion respondent *initiated* an inquiry as to what consideration he would be given if he were to discuss the Hockstad murder. (WHR 34, Appendix 55a, 56a) Darby subsequently contacted the Prosecutor's Office to find out what could be done for the

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[3] "WHR" has reference to pages of the "Walker" Hearing held on June 28, 1978. See Appendix, *infra*, pp.

respondent if he were to cooperate with respect to this murder case. (WHR 35, Appendix 56a)

Sgt. Darby was told by the prosecutor that if respondent would give a statement implicating himself and would testify against the others involved, he would be permitted to plead guilty to the lesser charge of manslaughter. (WHR 35, 40, Appendix 56a) Darby said that Agent Vince had told the respondent that although he could not give respondent any consideration, he would contact the U.S. Attorney and that he could probably give him consideration for a statement that he might give in relation to the murder case. (WHR 37, Appendix 56a, 57a)

Darby testified that the respondent was subsequently readvised of his *Miranda* rights in relation to the murder case and that respondent waived them. (WHR 38, 39, Appendix 57a, 58a) Respondent was then told by Darby that the prosecutor had agreed to permit him to plead guilty to manslaughter, provided he gave a statement implicating himself and testified in court against the others involved in the murder in question. (WHR 39, 40, Appendix 58a, 59a) Accepting the solicited offer, the respondent gave Sgt. Darby the confessional statement at issue. (WHR 41, Appendix 59a, 60a) The statement of the respondent, People's Exhibit #1, was introduced into evidence at the hearing without objection. (WHR 41, 42, Appendix 59a, 60a)

On cross-examination Sgt. Darby said that during the interview respondent requested permission to call his mother. This he did and while he spoke with her on the phone he cried. (WHR 45-47, Appendix 61a) At no time during the interview did the respondent request that it be terminated. (WHR 47, Appendix 62a)

Sgt. Darby said that although he took notes during the initial interview with the respondent, at no time did respondent review those notes. (WHR 50, Appendix 63a)

On redirect examination Darby said that there did not appear to be anything unusual about respondent's health or mental state during the interview. (WHR 53, Appendix 64a) He further related that there were no threats involved in obtaining the statement in question. (WHR 53, Appendix 64a) Sgt. Darby testified that the only reason he made any effort to obtain a charge concession was because the respondent was the one who initiated the inquiry. (WHR 54, Appendix 65a)

Respondent testified in his own behalf and gave a much different version of the circumstances surrounding the giving of the confessional statement in question. (WHR 56-73, Appendix 66a-78a) He claimed that he was depressed at the time of the interview and that it was Sgt. Darby, and not he, who initiated the discussion in relation to the consideration to be given in exchange for his statement and trial testimony against others involved in the murder. (See generally WHR 66-68, Appendix 72a-74a) Respondent further claimed that in giving the formal statement at issue, all he essentially did was recite from memory the statement that had been prepared for him by Sgt. Darby. (WHR 68, 69, 71-73, Appendix 74a-77a)

On cross-examination by the prosecutor respondent reasserted that he did not give Sgt. Darby his personal statement concerning the murder, and again claimed that all he did was repeat from memory the statement that had been prepared by Sgt. Darby. Respondent said that this was done in the presence of the stenographer. (WHR 82-85, Appendix 78a-81a) Respondent contended that the only reason that he gave the statement that he did was so that Sgt. Darby would leave him alone. (WHR 71, 85, Appendix 76a, 81a)

Respondent also asserted that before he gave the statement he requested to be returned to his cell, but that Sgt. Darby, instead of granting that request, asked him to give the statement in front of the stenographer. (WHR 71, 72, Appendix 76a, 77a)

At the conclusion of the testimonial hearing the trial court determined that the respondent's confession was voluntary and thus admissible trial evidence. The trial court rested its decision to admit the confession on the cases of *Missouri* v *Huston*, 537 SW 2d 809 (1976) and *Hunter* v *Swenson*, 372 F Supp 287 (1974); aff'd 504 F 2d 1104 (1974); cert den 43 L Ed 2d 662 (1975). (See R6-15, Transcript of June 27, 1978, and "Judge's Remarks, Re the admissibility of the confession"—dated July 5, 1978—Appendix 34a-39a)

During the trial respondent's confession was put into evidence through the court stenographer who read the entire matter to the jury. In that confession the respondent detailed the planning and execution of the crime and fully implicated Louis Ford and John Hamilton respecting the extent of their individual participation. This included the fact that respondent, following the planning stage of the robbery, entered the pharmacy with a gun along with Louis Ford, who was also armed. Respondent gave his recollection of the details surrounding the commission of the robbery, and the fact that it was Louis Ford who shot and killed the victim and that he (respondent) foiled an escape attempt by the pharmacist. Respondent also said that he personally held the pharmacist at gunpoint during the time Louis Ford was trying to commit the robbery. It was at this time he heard the gunshot (Ford's) that mortally wounded Thomas Chiavares. Respondent then related in detail their manner and mode of escape subsequent to the commission of the robbery and murder. (R 255-280)

REASONS FOR GRANTING THE WRIT

The case *sub judice* presents to this Honorable Court the opportunity to resolve the constitutional question of whether a pre-charge confession given by an accused following plea negotiations *initiated* by him is admissible or inadmissible under the "totality of the circumstances" approach, or whether a confession given under such circumstances is excludable as a matter of law or as having

been "the product of direct or implied promises" under the oft-quoted *per se* exclusionary rule set forth in *Bram* v *United States*, 42 L Ed 586 (1879).

The Michigan Supreme Court decision in the case at bar, per Justices Kavanagh, Williams and Levin, has decided a federal question and has interpreted the Fifth Amendment in a way that is in conflict with decisions of other state courts, the federal court of appeals and this Court. (Appendix 1a-11a). See, e.g., *Missouri* v *Huston*, 537 SW 2d 809 (1976); *State* v *Jordan*, 561 P 2d 1224 (1976); *Pontow* v *State*, 205 NW 2d 775 (1973); *Taylor* v *Commonwealth*, 401 SW 2d 920 (1971); cert den 30 L ed 2d 70; *People* v *Langford*, 76 Mich App 197 (1977); lv den, 403 Mich 835 (1978); cert den. 99 S Ct 1512 (1979); *Hunter* v *Swenson*, 372 F Supp 287 (1974); Aff'd 504 F 2d 1194 (1974); cert den. 43 L Ed 2d 662 (1975); *Stein* v *New York*, 73 S Ct 1077 (1953).

The aforesaid opinion of the Michigan Supreme Court creates a *per se* exclusionary rule under the Fifth Amendment of the United States Constitution and is not supported by any decision of the United States Supreme Court. The concurring opinion in the case *sub judice* correctly states that the United States Supreme Court has consistently applied a totality of the circustances approach to cases of this nature, and that despite *dicta* indicating the possibility of a *per se* test, this Court has rejected such an approach in an anologous case, citing *Brady* v *United States*, 25 L Ed 2d 747 (1970). (Appendix 12a, 13a)

At the hearing on the admissibility of the confession witnesses Vince and Darby related that the respondent had *initiated* the discussions with respect to charge concessions in exchange for information that he might give with respect to the robbery-murder at the Hockstad Pharmacy in Flint. Following respondent's informed and calculated solicitation, Sgt. Darby contacted the prosecuting attorney. Sgt. Darby subsequently informed the respondent that the prosecutor

related that he would permit respondent to plead guilty to the offense of manslaughter instead of being charged with and tried for the offense of first degree felony murder, provided he would testify against the others involved in the commission of the felony murder, and that he would give a statement implicating himself in the commission of that crime. (WHR 15, 16, 18, 35, Appendix 47a, 48a, 56a)

The respondent, pursuant to the terms of the concession he had solicited, and after being given his *Miranda* warnings, and knowingly and understandingly waiving his rights thereunder, gave a confessional statement concerning the commission of the murder in question. That statement set forth in substantial detail the planning and the actual commission of the crime, including the fact that he and Louis Ford entered the pharmacy, each armed with guns, while cofelon John Hamilton waited nearby in the getaway automobile. In that statement, which was considered at the testimonial hearing, and which was subsequently read to the jury at trial, the respondent said that it was Louis Ford who shot and killed the victim during the robbery. He further related that he personally prevented the pharmacist from trying to escape during the robbery and that he was holding the pharmacist at gun point when he heard Louis Ford shoot decedent Thomas Chiavares. Respondent also gave details with respect to their escape from the crime situs in the getaway auto which was driven by cofelon John Hamilton. (R 255-280)

After the giving of the aforesaid confession, the respondent made the decision not to follow through with the agreement he had obtained and accordingly declined to testify against his confederates and additionally declined to plead guilty to manslaughter.

The respondent, in support of his motion to suppress the confession, asserted at the testimonial hearing that the statement given to Sgt. Darby was not his own statement. He claimed, rather, that the statement was merely a mem-

ory recital of a statement that had been prepared by Sgt. Darby. Respondent further denied that he had initiated any discussions for charge concessions and asserted that it was Sgt. Darby who initiated those discussions. (WHR 66-68, Appendix 72a-74a) (WHR 68, 69, 71-73, Appendix 74a-77a)

The trial court perceived the motion for suppression of the statement as a legal question involving admissibility under *Miranda* v *Arizona*, 16 L Ed 2d 694 (1966), and, finding that the prosecution had met its burden of demonstrating a free and voluntary and knowing waiver of those rights, advanced to the question of whether appellant's confession should be excludable from evidence as a matter of law as having been "the product of direct or implied promises" under the oft-quoted *per se* exclusionary rule set forth in *Bram* v *United States*, 42 L Ed 568 (1897). (See Appendix 40a-44a)

The trial court below rested its decision to admit the confession in question on the cases of *Missouri* v *Huston*, 537 SW 2d 809 (1976) and *Hunter* v *Swenson*, 372 F Supp 287 (1974); aff'd 504 Fed 1104 (1974); cert den. 43 L Ed 2d 662 (1975). In *Huston* the Court concluded that a confession which followed a plea negotiation was properly admitted by the trial court into evidence. Viewing the case under the totality of circumstances test the Court concluded that:

> We have here a situation where the appellant initiated the negotiations for a plea of guilty. There was no improper questioning, no threats, no false promises, and no failure or refusal of the prosecution to carry out its part of the agreement. There is nothing to indicate that there was any improper conduct on the part of the prosecuting attorney or the sheriff which brought about the appellant's statement. Any rule to the effect that appellant's statement was not a free and voluntary expression on his part would ignore, for the sake of technical rules, the practicalities of the situation. When the totality of all the circumstances is considered, the

trial court correctly ruled that the confession was voluntary and therefore admissible in evidence. (537 SW 2d at pp. 813, 814)

In the *Hunter* case, *supra*, the defendant gave a confession in exchange for a reduced charge. There the Court specifically noted that in view of subsequently decided Supreme Court cases, the so-called *Bram* test ". . . is not viewed as proscribing admission of all promise-induced confessions." (372 F Supp at p. 301) The Court went on to further state that:

> . . . the rationale of *Bram* will not stand in the face of the Supreme Court's decisions on "plea bargaining." To say that the law cannot measure the possibly coercive impact of a promise of leniency would require the conclusion that guilty pleas induced by a promise of leniency must be rejected without exception. That is not the teaching of *Brady* and *Santobello*. If the Courts are able to determine whether a guilty plea was induced coercively by a promise of leniency (something this Court has done hundreds of times), then the courts are able to determine whether an admission or confession was coercively induced by a promise of leniency.

The Court then evaluated the factual circumstances under which the confession had been given and stated that in doing so it was applying:

> . . . the same test to Hunter's statement that is applied to all challenged admissions and confessions: the question is whether the conduct of the state's agents was such that it overbore the defendant's will to resist and brought about an admission or confession not freely self determined. *Rogers* v *Richman*, 365 U.S. 534, 544; 81 S Ct 735; F L Ed 2d 760 (1961); *Fernandez-Delgado* v *United States*, 368 F 2d 34, 36 (9th Cir 1966)
>
> The Court concludes without the slightest hesitation that Hunter's will to resist was not overborne in any

> degree by a promise of leniency. If a promise of leniency was made to Hunter, it was the product of his experienced and calculated solicitation . . . Hunter was the one who initiated the discussions of a deal. He made the offer to confess in exchange for a reduced charge. He enticed the Missouri authorities with claims that he knew who killed Lyle and that he knew where the murder weapon could be found. If Mr. Lance's message of August 5 was a promise to consider filing a reduced charge against Hunter in exchange for his statement, it was a promise solicited freely and voluntarily by Hunter himself. Hunter cannot now be heard to say that in accepting that promise he was the victim of compulsion. (footnote citation omitted) (372 F Supp at pp. 301, 302)

Factually, the case of respondent Jesse James Jones bears no real resemblance to the *Bram* case.

In *Bram* the defendant gave a confession while in police custody, alone and not represented by an attorney. Furthermore, it does not appear that he had been made promises of leniency. Furthermore, Bram was not given any advice of rights that are now required by the *Miranda* decision.

Although no two or ten cases are exactly alike, another one which is substantially close to the factual setting of the case at bench is *State* v *Harwick*, 552 P 2d 987 (1976). In that case the defendant offered to confess and then sought leniency. At the testimonial hearing on the issue of the voluntariness of the confession the defendant claimed that he never admitted committing any crime and made no deals with the police concerning any robbery. He further contended that if he did confess, the trial court erred in admitting the confession because he had been cajoled, threatened, and induced by promises to waive his privilege against self-incrimination.

In upholding the admissibility of the confession the Court said in pertinent part that:

> Here the appellant testified he read and signed the Miranda warnings under his own free will and talked to the police officer voluntarily. Detective Fraipont indicated the appellant confessed voluntarily. Thus if he confessed, the trial court's determination that the confession was voluntary is supported by substantial evidence. However, the appellant denied ever confessing to any robbery. Under the circumstances the trial court was correct in submitting the alleged confession to the jury. Under K.S.A. 22-3215(5) the circumstances surrounding the making of the confession may be submitted to the jury as bearing upon the credibility or the weight to be given the confession.
>
> The appellant, who had prior experience with police practices, also contends promises were made which vitiate the confession. . . . Here the state's evidence indicates the appellant first offered to confess and then sought leniency. When the promises are solicited by the accused, freely and voluntarily, the accused cannot be heard to say that in accepting the promise he was the victim of a compelling influence.

It is significant to note in the case *sub judice* the trial court's perception of the appellant and his relationship to the crime in question. Judge Elliott in this regard made these pertinent observations:

> After full explanation and waiver of "Miranda" rights and warnings, defendant was questioned about two gun charges and then asked if he would talk about the Hockstead [sic] homicide. Defendant initiated the plea bargain by asking what consideration would be given to him if he cleared up the case. The detective contacted a prosecutor and federal agent and defendant was advised, exactly and honestly, that the federal and state gun charges would be dropped and he could plead guilty to manslaughter if his confession implicated himself and he was willing to testify against the others

involved. Defendant was experienced in criminal matters; he knew his rights and he knew about plea bargaining. He is intelligent and was not under the influence of drugs or alcohol. * * *The plea offer to defendant was primarily to obtain his testimony as a witness against his accomplices; his confession would not be needed for use against him because he was expected to plead to manslaughter. He accepted the plea offer and told what happened in a self-serving way, but his story shows conclusively that he was personally involved at the robbery murder. He related details that were unknown to the detective who later verified them. There was no pressure or extended interrogation, no force, threat, trickery, deceit or other improper influence. Rather, defendant asked what consideration he could get, was truthfully told, and he agreed. Later he refused to go ahead with the plea bargain or testify, and he made the preposterous claim that he read a statement written by the detective and then gave that statement before the reporter from memory so he would be left alone. Yet even on the morning of the trial the prosecutor acknowledged a willingness to fulfill the bargain and allow defendant to plead to manslaughter. * * * (Appendix 40a, 41a)

I believe that a criminal such as the defendant, faced with a serious crime, such as robbery-murder, who is experienced in plea bargaining, who knows his rights and who is not crazy, is not going to cooperate with the police, snitch on his friends and put himself down for a term of life imprisonment, if the police interrogation is conducted in full accord with *Miranda*, if it is free of any force, threats, tricks or deceit and if it must also be free of "any direct or implied promise, however slight" as *Bram* literally requires.

Faced with this reality and the suspicion that defendant and his pals were getting away with murder, I do not blame the detective and prosecutor for answering the defendant's question about what deal he could make

with an offer of a reasonable plea bargain that looked to conviction of others and that required the defendant to accept the punishment for a serious but lesser degree of homicide. It was not a deal that would seduce an innocent man into a false confession. He would be required to be a witness against his partners and undergo cross-examination and spend a lot of time in prison. I cannot think of anything else the law enforcement officials could have done with any hope of enforcing the law that also would be honest and fair with the defendant. Frankly, a confession claimed to be without "any direct or implied promise, however slight" would be far more suspicious than the bargained-for confession of Jones. All of the law's concern should not be spent on defendants; the concept of justice is insulted when the guilty go free as well as when the innocent are convicted. (Appendix 43a)

The People would add to this the pertinent observation set forth in 79 Harv L Rev, Developments — Confessions, Vol. 79:938 at pp. 978, 979 (1966):

In *Mallory* v *Hogan*, the Court, in discussing the voluntariness cases, quoted from *Bram* v *United States* to the effect that a confession must not be "obtained by any direct or implied promises, however slight." But as a matter of language it seems difficult to see how a promise of benefit can be considered "coercion" or "compulsion." Given the fact that the constitutional requirement is one of free and rational choice, such promises do not seem offensive, since if they are honored, they may well constitute a sensible reason for confessing. (footnotes and citations omitted)

The author then makes reference to *Stein* v *New York*, 73 S Ct 1077 (1953), where the Court found as voluntary, the confession of Stein's codefendant (Cooper). There the Court noted with particularity that Cooper spent a substantial part of the time "driving a bargain with the police and

parole officers." Justice Jackson here also said in finding the confession voluntary that:

> The inward consciousness of having committed a murder and a robbery and of being confronted with evidence of guilt which they could neither deny nor explain seems enough to account for the confessions here. These men were not young, soft, ignorant or timid. They were not inexperienced in the ways of crime or its detection, nor were they dumb as to their rights. At the very end of his interrogation, the spectacle of Cooper naming his own terms for confession, deciding for himself with whom he would negotiate, getting what he wanted as a consideration for telling what he knew, reduces to absurdity his present claim that he was coerced into confession. Of course, these confessions were not voluntary in the sense that petitioners wanted to make them or that they were completely spontaneous, like a confession to a priest, a lawyer or a psychiatrist. But in this sense no criminal confession is voluntary.
>
> Cooper's and Stein's confessions obviously came when they were convinced that their dance was over and the time had come to pay the fiddler. Even then, Cooper was so far in control of himself and the situation as to dictate the quid pro quo for which he would confess. * * * Both confessions were "voluntary," in the only sense in which confessions to the police by one under arrest and suspicion ever are. (73 S Ct at p. 1093)

Under the facts and circumstances of the case *sub judice*, when compared and contrasted with the *Stein* case, *supra*, the petitioner maintains that the trial court was acting well within its discretion in determining that respondent's confession was voluntary. The petitioner further submits that it is reasonable to conclude from the record that at the time of the confessional statement the respondent was the equal of the police in knowledge and under-

standing of the consequences of the "deal" he sought and obtained, but subsequently repudiated. Cf., *Gallegos* v *Colorado*, 82 S Ct 1209 (1962).

Compare also: *State* v *Jordan*, 651 P 2d 1224 (1976); *Pontow* v *State*, 205 NW 2d 775 (1973); *Taylor* v *Commonwealth*, 401 SW 2d 920 (1971); Cert den. 30 L Ed 2d 70.

More recently, the Michigan Court of Appeals, in *People* v *Langford*, 76 Mich App 197 (1977) (lv den 403 Mich 835 (1978); cert den. 99 S Ct 1512 (1979), in a factual setting similar to the case at bar, found that the giving of a confession pursuant to a bargain solicited by the defendant, was admissible where he subsequently refused to carry out his end of the bargain.

The golden thread running through all of these cases appears to be that where an accused *initiates* a bargaining session with police and prosecuting authorities he will not normally be heard to complain that his statement was involuntary. See *United States* v *Williams*, 447 F Supp 631, 637 (1978) at fn. 13 citing Lederer, the Law of Confessions — the Voluntariness Doctrine, 74 Mil. L. Rev. 67, 82, which cites *United States* v *Faulk*, 48 C.M.R. 185 (A CMR 1475)[4]

While the Michigan Supreme Court three member opinion in this case applies a *per se* exclusionary rule to confessions made as a result of bargaining, it is submitted that the better policy to follow is one which requires that trial courts and appellate courts utilize the demonstrably fair "totality of the circumstances" test in determining the issue of the admissibility of such confessions. The Court, in *United States* v *Williams*, 447 F Supp 631, 637 (1978) probably best sums up the point that petitioner is trying to make in this case. After reviewing numerous factors consi-

[4]See *Edwards* v *Arizona*, 68 LE 2d 378 (1981), which further demonstrates the significance of who *initiates* the discussion.

dered by various courts in this area of the law, the Court said in pertinent part that:

> . . . Considered as a whole, the distinctions perceived in the case law lead ineluctably to the conclusions that the totality of circumstances must be examined in order to evaluate the voluntariness of an induced confession; adherence to a per se suppression doctrine is unsatisfactory.
>
> Third, as a matter of policy, weighing the potential unreliability of confessions resulting from promissory inducements against the probable loss of probative pre-indictment confessions that would result from rigid adherence to a per se doctrine, the balance tips in favor of concluding that the entire factual circumstances of a case must be perused.
>
> The Court is fully cognizant of the extreme difficulty this determination may often entail as well as the strong impression a confession may make upon a jury. In doubtful cases, the appropriate course may well be to require suppression. But because *Bram* is not a per se rule of suppression, the Court is under a duty to determine the voluntariness of a statement by evaluating the totality of the circumstances surrounding it. That voluntary and reliable confessions can be obtained at the pre-indictment stage justifies the searching evaluation that must be made. (citations in fns. 14 and 16 omitted.)

Although the recent United States Supreme Court decision in *Hutto* v *Ross*, 50 L. Ed 2d 194 (1976) reaffirms that the *Bram* case retains some validity, it is submitted that the decision in that case does not present a ready-made answer to the issue presented in the case at bar since that case and the case at bar are factually distinguishable. In *Hutto*, the Supreme Court considered the question of whether a confession is *per se* inadmissible in a criminal case where it was made after an agreed upon plea bargain which did not call for such a confession and before the withdrawal from

the bargain. The Court held that it was not, and ruled that the Court of Appeals had erred in determining that "any statement made as a result of a plea bargain is inadmissible." The Court also noted that the case before it did not "involve the admissibility in criminal trials of statements made during the plea negotiation process," referring to Rule 11(3)(6), *Moulder* v *State*, 289 NE 2d 522 (1972) and the ABA Project on Standards for Criminal Justice, Pleas of Guilty §3.4 (Approved Draft 1968). The implication, of course, is that not all statements made as a result of a plea bargain are excludable.

The *Bram* case has obviously created a continuing evidentiary polemic as is witnessed by the numerous decisions discussing it since it was written and handed down some 85 years ago. But it is submitted that that case aside, there is in the law yet another basis upon which to hold that the confession in this case was admissible trial evidence.

The case of *Commonwealth* v *Knapp*, 10 Pick 477 (1830), although decided 153 years ago, sets forth what the petitioner believes to be an appropriate policy rationale for upholding the trial court's decision to admit into evidence the defendant's confession in the case *sub judice*. In that case one of the codefendants gave a confession under circumstances similar to that of the case at bar, and he too refused to testify against his cofelons and subsequently sought to preclude the State from using his confession against him at his trial.

In *Knapp* the Court found that a confession made under such circumstances must be considered as being freely and voluntarily made. The Court also said that a prisoner who fails to follow through with his agreement to testify against his cofelons ". . . is not at liberty to take back the confession which he deliberately made." (pp. 493, 494) Contrary to the position taken by the Michigan Supreme Court in the case *sub judice*, the Massachusetts Court found that a confession is not involuntary "merely because the party hoped to obtain a benefit thereby." (p. 494)

Similarly, in *State* v *Moran*, 14 P 419 (1887) the Oregon Supreme Court, per Strahan, J., relying upon *Commonwealth* v *Knapp*, *supra*, upheld the admissibility of a confession where the defendant obtained an agreement that he would not be prosecuted for murder, and gave a confession and subsequently refused to testify against his murder confederate as he had agreed to.

After making specific reference to the full language of the *Knapp* case, the Court said:

> ". . . And we believe the law to be clearly settled there that if they refuse to testify, or to testify falsely, they are to be tried themselves, and may be convicted on their own confession which was made after they were permitted to become witnesses for the crown." This case was decided in 1830, and so far as our research extends, has never been overruled or questioned. (14 Pd at p. 424)

In the *Whiskey Cases*, 99 US 594 (1879) the United States Supreme Court recognized the legal principle from the *Knapp* case, *supra*, and stated that:

> . . . Such offenders, if they make a full disclosure of all matters within their knowledge in favor of the prosecution, will not be subjected to punishment; but if they refuse to testify, or testify falsely, they are to be tried, and may be convicted upon their own confession.

The above principle has also been recognized in Michigan. See *Alderman* v *The People*, 4 Mich 414, 422, 423 (1857).

The petitioner submits that under the above cited cases (*Comm.* v *Knapp; State* v *Moran; Whiskey Cases and Alderman*, *supra*) this Court should be persuaded, as a matter of sound judicial policy, to permit the use of confessions at trials where the accused fails to keep his end of a bargain he has solicited, especially where as here, the accused has full knowledge, from *Miranda* warnings, that

what he says will be used against him in a trial. It is very clear under Michigan law that had the appellant kept his end of his solicited bargain that the prosecutor would have been prohibited from not keeping his promise. Cf., *People* v *Reagan*, 395 Mich 306 (1975). The policy considerations that require such a result are just as imperative in cases such as the case at bar. To hold otherwise permits similarly situated defendants to trifle with the government "and the cause of justice is impeded." *Knapp, supra*, at p. 487.

The petitioner maintains that under the facts of this case, this Court should conclude, as did the trial court and the Michigan Court of Appeals below, that the statement given to police officials was voluntary. There is no evidence that the respondent's will was overborne and the record is clear that the statement given was freely self-determined and was knowingly made by the respondent, who was fully aware of his constitutional right not to give a statement incriminating himself, with knowledge and notice that if he did give a statement, the State had every intention of using that statement against him in criminal proceedings against him if such eventuality arose.

In this case there is no evidence of coercion or protracted interrogation. The statement given by the respondent herein which was the result of a promise granted by prosecuting officials was clear, honest, and forthright and most assuredly conferred a real benefit upon the respondent. The prosecutor, even to the trial date, was willing to give the respondent the benefit of the bargain that had been struck. (See Transcript of June 27, 1978 at R 11, 12; Appendix 37a)

No one will gainsay that confessions obtained in the pre-charge setting should be closely scrutinized when a confessing defendant challenges the admissibility of a confession that came about through negotiation alleged to have been initiated by the accused. But since the better reasoned appellate court decisions are confident and certain through experience that voluntary and reliable confessions can be

obtained from advised and informed modern day defendants and that modern courts are equipped to pass judgment on the question of whether a confession or admission was coercively induced by a promise of leniency, it is submitted that to invoke a *per se* exclusion of confessions so obtained is contrary to our sense of justice and fair play. *United States* v *Williams*, 447 F Supp 631 (1978); *Pontow* v *State*, *supra; Hunter* v *Swenson*, *supra*.

Furthermore, the posture assumed and the position taken by the respondent in relation to the statement at issue injects a legal issue which would appear to take this case out of the class of cases which have applied a *per se* exclusionary rule to so-called promise-induced confessions. That is to say that the respondent herein denied initiating any bargaining with police officials and additionally denied that the statement he gave was his personally developed and recited confession. By so doing, the respondent's confession, after the trial court determined it to have been voluntarily given, became a matter which was properly submissible to the trier of fact. *State* v *Harwick*, 552 P 2d 987 (1976); *People* v *Gilbert*, 55 Mich App 168 (1974). Cf. also *United States* v *Williams*, 447 F Supp 631, 637 (1978), fn. 14. The course of action of the respondent as manifested by the position taken at the *Walker* hearing and at the trial of the case should leave no doubt that the trial court's ruling was the correct result under the facts of this case. Here the records and files show that at the *Walker* hearing the respondent denied giving a confession to Sgt. Darby. (Transcript of June 23, 1978) at WHR 66-73, 82-85; Appendix 72a-77a, 78a-81a) At trial defense counsel elicited from Sgt. Darby that respondent denied that the statement in question was his own personal statement. (R 303) The trial record further demonstrates pursuit of this theory at trial where the matter was fully argued to the jury by defense counsel. (See R 354, 359, 360, 361, 365, 366, 367, 368, 373 and 375)

The record is also clear that the trial court instructed the jury fully and fairly in accord with the defense theory

for disregarding the confessional statement. (R 388, 389)

For all of the above reasons petitioner prays that this Honorable Court will exercise its jurisdiction and rule that the Michigan trial court and Michigan Court of Appeals properly ruled that respondent's confession was voluntarily given and was properly submitted to the trier of fact for its consideration.

CONCLUSION

WHEREFORE, petitioner respectfully requests that this Honorable Court grant this petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Michigan.

Respectfully submitted,

ROBERT E. WEISS P-22148
Genesee County Prosecuting Attorney

DONALD A. KUEBLER P-16282
Chief, Appellate Division
Counsel for Petitioner

DATED: February 9, 1983

APPENDIX

IN THE
SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1982

NO.

STATE OF MICHIGAN,
Petitioner,

v

JESSE JAMES JONES,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF MICHIGAN

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Opinion of the Supreme Court
of the State of Michigan
(Filed: December 23, 1982)

OPINION OF THE SUPREME COURT
OF THE STATE OF MICHIGAN
(Filed: December 23, 1982)

STATE OF MICHIGAN
SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee

v No. 66011

JESSE JAMES JONES,
Defendant-Appellant.

BEFORE THE ENTIRE BENCH (except Riley, J.)
KAVANAGH, J. (For reversal)

Jesse James Jones was convicted of first-degree murder by a jury and was sentenced to life imprisonment. MCL 750.316; MSA 28.548. The conviction was based in part on his confessional statement, admitted into evidence over his objection.

On appeal, the Court of Appeals affirmed in an unpublished opinion, finding under the "totality of circumstances" that the defendant's confession was admissible. Defendant asserts that the statement made by him pursuant to a plea agreement that he later refused to carry out was improperly admitted into evidence.

We reverse the decision of the Court of Appeals and hold that the statement made by the defendant required by the plea agreement is inadmissible per se. We remand for a new trial.

On December 28, 1977, Thomas Chiavares was murdered at the Hockstad Pharmacy in Flint, Michigan, during

the course of an armed robbery. On April 27, 1978, defendant Jones was arrested for unlawfully carrying a sawed-off shotgun. Sergeant Darby of the Flint Police Department met with Jones on April 28, 1978, while Jones was in custody for federal and state weapons offenses. Jones was advised of his rights under *Miranda*,[1] and, upon a waiver of his rights, he discussed the weapons charges.

During that interview, Jones was told that he was a suspect in the Hockstad murder case. Sergeant Darby asked Jones if he wanted to discuss that crime and reminded him of his *Miranda* rights. Jones denied knowing anything about the murder, and the discussion returned to the weapons charges. Jones asked about the possible penalty for the federal and state weapon offenses. Darby told Jones that the federal firearms charge had a ten-year maximum sentence and that the state charge had a possible sentence of five years. Jones was also told that he could possibly be sentenced to prison for violating parole. Jones required as to what consideration he would be given if he were to discuss the Hockstad murder. He said he knew a great deal and could clear up the case.

Sergeant Darby contacted the prosecutor and a federal agent and advised Jones that if he would give a statement implicating himself in the Hockstad murder and would testify against the others involved, the federal and state gun charges would be dropped and Jones could plead guilty to manslaughter. Jones was again advised of his *Miranda* rights, and he voluntarily waived his right to counsel and agreed to tell all he knew about the Hockstad case. He then made the confessional statement now at issue to the police. His statement detailed the planning and carrying out of the

[1] *Miranda* v *Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

robbery attempt and killing, fully implicating himself and two others.

Later Jones refused to carry out the plea agreement. He was charged with murder in the perpetration of an armed robbery. A pretrial motion to suppress the confession was filed by defendant's trial attorney, and an evidentiary hearing was conducted. At the conclusion of the hearing, the trial court determined that the confession was voluntary and thus was admissible as evidence.

On the morning of the trial, the prosecutor acknowledged a willingness to fulfill the plea agreement, but Jones again refused. At trial, defendant's confession was admitted into evidence and presented to the jury over the objection of defendant's attorney. Jones was convicted of first-degree murder and received a mandatory sentence of life imprisonment.

The Court of Appeals affirmed defendant's conviction and found under the "totality of the circumstances" that the trial court's decision that defendant's confession was properly admissible as evidence was not erroneous.[2]

The use of involuntary admissions in a criminal prosecution is prohibited by the Fifth Amendment right against self-incrimination:

> "In criminal trials, in courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness

[2] *People* v *Jones*, unpublished opinion per curiam of the Court of Appeals decided April 25, 1980 (Docket No. 78-3255).

against himself.' " *Bram* v *United States*, 168 US 532, 542; 18 S Ct 183; 42 L Ed 568 (1897).

The Fifth Amendment's right against compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the states. *Malloy* v *Hogan*, 378 US 1, 6; 84 S Ct 1489; 12 L Ed 2d 653 (1964).

The reason that involuntary confessions are not admissible evidence was set forth by the Court in *Rogers* v *Richmond*, 365 US 534, 540-541; 82 S Ct 735; 5 L Ed 2d 760 (1961):

> "Our decisions under [the Fourteenth] Amendment have made clear that convictions following the admission into evidence of confessions which are involuntary, *i.e.*, the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth. See *Chambers* v *Florida*, 309 US 227; 60 S Ct 472; 84 L Ed 716 (1940); *Lisenba* v *California*, 314 US 219, 236; 62 S Ct 280; 96 L Ed 166 (1941); *Rochin* v *California*, 342 US 165, 172-174; 72 S Ct 205; 96 L Ed 183 (1952); *Spano* v *New York*, 360 US 315, 320-321; 79 S Ct 1202; 3 L Ed 2d 1265 (1959); *Blackburn* v *Alabama*, 361 US 199, 206-207; 80 S Ct 274; 4 L Ed 2d 242 (1960). And see *Watts* v *Indiana*, 338 US 49, 54-55; 69 S Ct 1347; 69 S Ct 1357; 93 L Ed 1801 (1949)."

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In determining whether a confession is voluntary, the test is whether the confession was " 'extracted by any sort of threats or violence, [*or*] *obtained by any direct or implied promises, however slight,* [or] by the exertion of any improper influence.' " *Bran, supra,* pp 542-543. (Emphasis supplied.)

This test has been applied by several recent federal and state courts, which have found that confessions induced by promises of leniency are inadmissible.[3] The decision of the court in *Gunsby* v *Wainwright,* 596 F2d 654 (CA 5, 1979) *cert den* 444 US 946; 100 S Ct 307; 62 L Ed 2d 315 (1979), is particularly noteworthy because of the similarity

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[3] *Gunsby* v *Wainwright,* 596 F 2d 654 (CA 5, 1979), *cert den* 444 US 946; 100 S Ct 307; 62 L Ed 2d 315 (1979); *McLallen* v *Wyrick,* 498 F Supp 137, 139 (WD Mo, 1980) ("A confession can never be received in evidence where the prisoner has been influenced by any threat or promise."); *United States* v *Harris,* 301 F Supp 996, 999 (ED Wis, 1969) ("Having found that the defendant confessed in return for what he believed to be the promise of the law enforcement officials to secure certain reciprocal treatment, I hold that his confession * * * was not voluntary and hence is inadmissible."); *People* v *Quinn,* 61 Cal 2d 551, 554; 393 P2d 705, 707; 39 Cal Rptr 393, 395 (1964) (Traynor, J), ("A confession or admission induced by promises of leniency or by threats is involuntary and therefore inadmissible."); *Bradley* v *State,* 356 So 2d 849, 850 (Fla App, 1978), ("[A]n accused may not be improperly urged by direct or implied promises to make a statement, in violation of the basic tenet of law that a confessing defendant should be entirely free from the influence of hope or fear."); *People* v *Overturf,* 67 Ill App 3d 741, 385 NE2d 166 (1979); *State* v *Tardiff,* 374 A2d 598, 600 (Me, 1977) ("That a confession which has been extracted from a defendant as the result of assurances or promises of leniency is inadmissible, is well established."); *Commonwealth* v *Meehan,* 377 Mass 552, _____, 387 NE2d 527, 534, (1979), *cert dis* as improvidently granted 445 US 39; 100 S Ct 1092; 63 L Ed 2d 185 (1980) ("An officer may suggest broadly that it would be 'better' for a suspect to tell the truth, may indicate that the person's cooperation would be brought to the attention of the public officials or others involved, or may state in general terms that cooperation has been considered favorably by the courts in the past. What is prohibited, if a confession is to stand, is an assurance, express or implied, that it will aid the defense or result in a lesser sentence.") (footnotes omitted).

of its factural situation to the case at bar. In *Gunsby*, in exchange for a maximum sentence of 7-1/2 years and no objection from the state to probation, the defendant agreed to plead guilty and testify against two codefendants. Additionally, pursuant to the plea bargain, the defendant gave a statement incriminating himself and a codefendant. However, the plea bargain was set aside after the defendant testified because his testimony tended to exculpate rather than incriminate his codefendant. The confession was admitted into evidence at trial over objection, and the defendant was convicted and sentenced to twenty years in prison.

In granting the defendant's petition for habeas corpus, the Fifth Circuit held that because the statement was given as a result of promises made by the state in the plea bargain, "[t]he district court's conclusion that the statement was legally involuntary and inadmissible at Gunsby's state trial was thus compelled under *Hutto* v *Ross*, 429 US 28; 97 S Ct 202; 50 L Ed 2d 194 (1976)." "The [*Hutto*] Court held that the confession was not the result of any direct or implied promise and was voluntarily given. Conversely, a confession given as the result of a direct or implied promise would be legally involuntary." *Gunsby, supra*, p 656.

In the instant case, the confession was made as part of an agreement. In return for a statement implicating himself in the Hockstad murder and testimony against the others included, Jones would be permitted to plead guilty to manslaughter for the Hockstad murder, and the unrelated federal and state gun charges would be dropped. There is no question but that Jones's confession was "obtained by" the prosecutor's promise.

The people contend that where an accused initiates the bargaining session with the police and prosecuting au-

thorities, he should not be heard to complain that his statement was involuntary. Several state courts,[4] along with the Michigan Court of Appeals,[5] have held that a confession is not "induced" when a defendant initiates the bargaining. However, the distinction is irrelevant.[6] The confession is a product of the plea agreement whether the defendant, the prosecutor, or a police officer initiates the bargaining.

The fact that the defendant initiates the bargaining does not mean that the defendant is not influenced by the state's promises. The confession is no more reliable simply because the defendant begins the negotiating. In *People* v *Wolcott*, 51 Mich 612, 615; 17 NW 78 (1883), Justice Cooley agreed with the reasoning of many other courts and found that no reliance can be placed on admissions of guilt obtained by assurances of leniency "for the very obvious reason that they are not made because they are true, but because, whether true or false, the accused is led to believe it is for his interest to make them." (Citations omitted.) However, it is no less in the defendant's interest to accept a plea bargain when he initiates the bargaining than when bargaining is initiated by the state. Therefore, because the defendant is still influenced by the state's promises of leniency and there is no reason to conclude that a confes-

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[4] *State* v *Harwick*, 220 Kans 572; 552 P2d 987 (1976), *State* v *Jordan*, 114 Ariz 452; 561 P2d 1224 (1976), *Taylor* v *Commonwealth*, 461 SW2d 920 (Ky App, 1970), and *State* v *Hutson*, 537 SW2d 809 (Mo App, 1976).

[5] *People* v *Jones*, fn 2 *supra*, and *People* v *Langford*, 76 Mich App 197, 199; 256 NW2d 578 (1977).

[6] The fact that the defendant initiated the bargaining was apparently of no significance to the court in *United States* v *Harris*, *supra*, footnote 3. In *Harris*, the defendant indicated that he would be willing to provide information if he would receive certain considerations, and then proceeded to name three conditions. The court found that the defendant's confession was involuntary without discussion of the fact that the defendant defined the terms of the bargain.

sion pursuant to a plea bargain initiated by the state is any more reliable than the same confession when bargaining is initiated by the defendant, we find no reason to conclude that a confession is voluntary merely because the defendant initiates the bargaining.

Similarly, while *Miranda* warnings and advice of counsel (defendant Jones voluntarily waived his right to counsel) tend to support a conclusion that a plea was a well-advised, intelligent exercise of choice, they do not negate the pressure or inducements of the plea bargain.[7]

The Court of Appeals held that the issue of the applicability of MRE 410 was not properly subject to review because the defendant did not raise the issue at trial. MRE 410 is not the basis of our decision today, but the rule and its rationale support our decision.

Under MRE 410, defendant's confessional statement could not be used against him:

> "Except as otherwise provided in this rule, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of *an offer to plead guilty* or nolo contendere to the crime charged or any other crime, *or of statements made in connection with any of the foregoing* pleas or *offers*, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later

[7] See, *e.g.*, *People* v *Overturf*, 67 Ill App 3d 741, 744; 385 NE2d 166, 168 (1979) ("It is a well settled rule that even where constitutional rights have been waived, promises of leniency which induce defendant to make a statement or confession may well render such statement or confession involuntary.") *State* v *Tardiff*, 374 A2d 598, 601 (Me, 1977) ("The fact that the defendant was informed of his *Miranda* rights prior to making his confession does not cure the improper inducement which led to it.")

withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement." (Emphasis supplied.)

MRE 410 is similar to Rule 410 of the Federal Rules of Evidence and Rule 11(e)(6) of the Federal Rules of Criminal Procedure.[8] The purpose of these rules is to promote the disposition of criminal cases by compromise[9] and to permit the unrestrained candor which produces effective plea discussions.[10]

The plea-bargaining process is an asserted component of the administration of criminal justice. It has become an accepted fact of life. Chief Justice Burger expressed the

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[8] Rule 11(e)(6) of the Federal Rules of Criminal Procedure which supplanted Rule 410 of the Federal Rules of Evidence was amended April 30, 1979, to read:

"(6) *Inadmissibility of Pleas, Plea Discussions, and Related Statements.* Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(A) a plea of guilty which was later withdrawn;

(B) a plea of nolo contendere;

(C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or

(D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel."

[9] FRE 410, Advisory Committee's Notes.

[10] FR Crim P 11, Notes of Advisory Committee on Rules.

need and desirability of the plea-bargaining process in *Santobello* v *New York*, 404 US 257, 260-261; 92 S Ct 495; 30 L Ed 2d 427 (1971):

> "The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subject to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.
>
> "Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned. See *Brady* v *United States*, 397 US 742, 751-752 [90 S Ct 1463; 25 L Ed 2d 747] (1970)."

For plea bargaining to work effectively and fairly, a defendant must be free to negotiate without fear that his statements will later be used against him. In excluding a defendant's plea-related statements, Judge Coleman of the Fifth Circuit Court of Appeals wrote:

> "If, as the Supreme Court said in *Santobello*, plea bargaining is an essential component of justice and, properly administered, is to be encouraged, it is im-

mediately apparent that no defendant or his counsel will pursue such an effort if the remarks uttered during the course of it are to be admitted in evidence as proof of guilt. Moreover, it is inherently unfair for the government to engage in such an activity, only to use it as a weapon against the defendant when negotiations fail." *United States* v *Ross*, 493 F2d 771, 775 (CA 5, 1974). See *United States* v *Herman*, 544 F2d 791 (CA 5, 1977).

This decision is consistent with prior Michigan law holding inadmissible at a subsequent trial a plea of guilty which was later withdrawn. *People* v *Street*, 288 Mich 406; 284 NW 926 (1939); *People* v *Trombley*, 67 Mich App 88; 240 NW2d 279 (1976). In *People* v *George*, 69 Mich App 403, 245 NW2d 65 (1976), the Court held that statements made in connection with withdrawn guilty pleas are likewise inadmissible at the defendant's subsequent trial. It follows that when the defendant merely offers or agrees to plead guilty, the offer and statements made in connection therewith should also be inadmissible at the defendant's subsequent trial. To hold otherwise would put the defendant who merely offers or agrees to plead guilty in a worse position than the defendant who actually pleads guilty and later withdraws his plea.

The people are not prejudiced by our decision today. In the words of Circuit Judge Goldberg:

> "the government's inability to introduce the statements made in a bargaining session does not place it in a worse position than it would occupy if an accused chose not to engage in plea bargaining at all." *Herman*, *supra*, p 797.

The government must fulfill its obligation of independently assembling and proving its case against the defendant.

(s) THOMAS GILES KAVANAGH
(s)
(s) CHARLES L. LEVIN

Opinion of the Supreme Court
of the State of Michigan
(Filed: December 23, 1982)

STATE OF MICHIGAN
SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiffs-Appellees,

v No. 66011

JESSE JAMES JONES,
Defendant-Appellant.

BEFORE THE ENTIRE BENCH (except Riley, J.)
RYAN, J. (*concurring in the result*).

Defendant Jesse James Jones was convicted of first-degree murder and sentenced to life imprisonment. MCL 750.316; MSA 28.548. His conviction depended heavily on a statement made by him pursuant to a plea-bargaining agreement in which he implicated himself and his accomplices in an armed robbery during which the murder occurred. The plea bargaining was initiated by the defendant, and his statement was used against him at trial when he refused to abide by the agreement. He asserts that the statement was improperly admitted into evidence because it was involuntary.

My colleague has found the statement involuntary and inadmissible per se because it was the product of a plea-bargaining agreement, even though that agreement was initiated by the defendant. It is said that the statement is a product of the agreement and induced by the prosecutor's promise to allow the defendant to plead guilty to manslaughter, and agreement to drop certain weapons charges. Thus, the confession was coerced.

I disagree with my colleague's reasoning, but not with the result reached. The creation of a per se rule under the

United States Constitution is an unprecedented and unwarranted step. The United States Supreme Court has consistently applied a *totality of the circumstances* approach — a test applied by both the trial and appellate courts below. Despite dicta indicating the possibility of a per se test, the cases on point continue to apply the totality test, and the United States Supreme Court has rejected a per se approach in a somewhat analogous case. *Brady* v *United States*, 397 US 742; 90 S Ct 1463; 25 L Ed 2d 747 (1970). A per se approach is unjustified, particularly in the circumstances of this case. It will only serve to confuse the application of the totality of the circumstances test in the courts below in future cases.

I

The defendant was arrested on April 27, 1978, for unlawfully carrying a sawed-off shotgun. He was questioned by Sergeant Darby of the Flint Police Department after being advised of his *Miranda*[1] rights. After being told that he was a suspect in a December 28, 1977, murder and asked if he wished to discuss it, and reminded of his *Miranda* rights, Jones denied knowing anything. Later, however, after being informed of the possible sentences for the state and federal weapons violations and for violation of parole, he inquired as to the consideration he might receive if he told what he knew of the murder.

Darby then contacted the assistant prosecutor and a federal agent. An assistant prosecuting attorney advised that Jones would be permitted to plead guilty to manslaughter if he would give a statement implicating himself in the murder and testify against anyone else involved. The fed-

[1] *Miranda* v *Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

eral agent indicated that all federal weapons charges would be dropped if Jones cooperated.

Jones agreed to give a statement. He was informed of his *Miranda* rights again and voluntarily waived his right to counsel. He then gave a detailed statement concerning the murder and the robbery attempt during which the murder occurred.

Subsequently, Jones refused to carry out his plea bargain. As a result, the prosecutor charged him with murder in the perpetration of an armed robbery and, at trial, sought to have the defendant's confession introduced. A pretrial motion to suppress was filed on June 14, 1978, by the defendant's trial attorney. The trial judge conducted an evidentiary hearing and found the confession to be voluntary. The trial judge also found that Jones was street-wise and experienced in criminal proceedings, and that it was he who refused to abide by the agreement.

On the first day of trial, the prosecutor indicated his continuing willingness to abide by the agreement; the defendant, however, continued in his refusal to carry out the bargain. Consequently, Jones's confession was admitted into evidence and read to the jury over the objection of his attorney that the statement was "involuntary". Jones was convicted of first-degree murder on June 29, 1978, and later sentenced to life imprisonment.

On appeal, the appellate court applied the *People* v *McGillen, #1*, 392 Mich 251; 220 NW2d 677 (1974), standard to the trial court's determination whether the defendant's statement was voluntary. It independently reviewed the facts and, like the trial court, applied a "totality of the circumstances" test to determine voluntariness. The Court of Appeals was not left with the firm and definite conviction that the trial court had erred. Thus, it affirmed.

II

My colleague has found that the defendant's statement, made pursuant to the plea-bargaining agreement, is "inadmissible per se". There is no indication what standard of review is employed in reviewing the voluntariness determination of the lower courts, but my brother's reasoning clearly suggests that he believes any incriminating statement made pursuant to a plea-bargaining agreement is one induced by the prosecutor's promise and, therefore, involuntary under the Fifth Amendment of the United States Constitution as applied to the states through the Fourteenth Amendment.

I agree that the defendant's conviction must be reversed. However, I strenuously disagree with my colleague's reasoning which I think will have a devastating impact upon the jurisprudence of this state. A per se approach to this problem is unjustifiably broad, particularly under the circumstances of this case.

Neither precedent nor policy require a per se rule. It is well established that a defendant's involuntary confession is inadmissible to prove his guilt of the crime confessed. *Rogers* v *Richmond*, 365 US 534; 81 S Ct 735; 5 L Ed 2d 760 (1961), and this prohibition applies to the states as well. *Malloy* v *Hogan*, 378 US 1; 84 S Ct 1489; 12 L Ed 2d 653 (1964). The Supreme Court has indicated that an involuntary confession is one in which the subject's will has been overborne by either physical or psychological coercion. See *Schneckloth* v *Bustamonte*, 412 US 218; 93 S Ct 2041; 36 L Ed 2d 854 (1973); *Blackburn* v *Alabama*, 361 US 199; 80 S Ct 274; 4 L Ed 2d 242 (1960). A convenient criterion for determining involuntariness is: "Is the confession the product of an essentially free and unconstrained choice by its maker?" *Schneckloth, supra*, p 225.

Despite the ease in stating this test, it is not so easy to apply. The United States Supreme Court has indicated that one must look at the facts of each situation — at the "totality of the circumstances" — to see whether a confession is voluntary. See, *e.g.*, *Mincey* v *Arizona*, 437 US 385; 98 S Ct 2408; 57 L Ed 2d 290 (1978); *Clewis* v *Texas*, 386 US 707; 87 S Ct 1338; 18 L Ed 2d 423 (1967).

> "In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances — both the characteristics of the accused and the details of the interrogations. Some of the factors taken into account have included the youth of the accused, *e.g.*, *Haley* v *Ohio*, 332 US 596; 68 S Ct 302; 92 L Ed 224 (1948), his lack of education, *e.g.*, *Payne* v *Arkansas;* 356 US 560; 78 S Ct 844; 2 L Ed 2d 975 (1958), or his low intelligence, *e.g.*, *Fikes* v *Alabama*, 352 US 191; 77 S Ct 281; 1 L Ed 2d 246 (1957), the lack of any advice to the accused of his constitutional rights, *e.g.*, *Davis* v *North Carolina*, 384 US 737; 86 S Ct 1761; 16 L Ed 2d 895 (1966), the length of detention, *e.g.*, *Chambers* v *Florida*, *supra*, the repeated and prolonged nature of the questioning, *e.g.*, *Ashcraft* v *Tennessee*, 322 US 143; 64 S Ct 921; 88 L Ed 1192 (1944), and the use of physical punishment such as the deprivation of food or sleep, *e.g.*, *Reck* v *Pate;* 367 US 433; 81 S Ct 1541; 16 L Ed 2d 948 (1961). In all of these cases, the Court determined the factual circumstances surrounding the confession, assessed the psychological impact on the accused, and evaluated the legal significance of how the accused reacted. *Culombe* v *Connecticut*, 367 US 568, 603; 81 S Ct 1860; 6 L Ed 2d 1037 (1961).
>
> *"The significant fact about all of these decisions is that none of them turned on the presence or absence of*

a single controlling criterion; each reflected a careful scrutiny of all the surrounding circumstances. See *Miranda* v *Arizona*, 384 US 436, 508; 86 S Ct 1602; 16 L Ed 2d 694; 10 ALR3d 974 (1966) (Harlan, J., dissenting); *id.*, pp 534-535, 16 L Ed 2d 694, 10 ALR3d 974 (White, J., dissenting)." *Schneckloth, supra*, p 226. (Footnote omitted.) (Emphasis added.)

Since *People* v *Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965), which required the trial judge to hold an evidentiary hearing and make an initial determination of voluntariness, Michigan courts have applied a totality of the circumstances test. This has been the the analysis employed by this Court when reviewing a lower court's decision. See *People* v *Paintman*, 412 Mich 518; 315 NW2d 418 (1982); *People* v *Brannan*, 406 Mich 104; 276 NW2d 14 (1979); *People* v *Robinson*, 386 Mich 551; 194 NW2d 709 (1972). Consequently, the establishment of a per se rule of involuntariness is a break with both federal precedent and Michigan precedent, which has basically followed federal law in this area. Although resting his decision on the federal constitution, my colleague fails to apply the totality test used by the United States Supreme Court. That Court has not based its decisions on the "presence or absence of a single controlling criterion". *Schneckloth, supra*, p 226.

The cornerstone of my colleague's argument is dictum from *Bram* v *United States*, 168 US 532; 18 S Ct 183; 42 L Ed 568 (1897). That Court, approvingly quoting a rule of law, said:

"In 3 Russel on Crimes (6th ed), p 478, it is stated as follows:

" 'But a confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any

direct or implied promises, however slight, nor by the exertion of any improper influence.' " *Bram, supra*, pp 542-543.

Admittedly, this language *standing alone* would lend itself to a per se approach; however, despite approval of this statement of the rule, the Court applied a totality of the circumstances approach. It said:

"In approaching the adjudicated cases for the purpose of endeavoring to deduce from them what quantum of proof, in a case presented, is adequate to create, by the operation of hope or fear, an involuntary condition of the mind, the difficulty encountered is, that all the decided cases necessarily rest upon the state of facts which existed in the particular case, and, therefore, furnish no certain criterion, since the conclusion that a given state of fact was adequate to have produced an involuntary confession does not establish that the same result has been created by a different although somewhat similar condition of fact. * * *

"The first of these statements but expresses the thought that whether a confession was voluntary was primarily one of fact, and therefore *every case must dependend upon its own* proof." *Bram*, pp 548-549. (Emphasis added.)

Bram involved a defendant who gave a confession while in custody, alone and unrepresented by counsel. At no time were promises of leniency mentioned by his interrogator. Rather, the court looked at the circumstances of the interrogation, including the fact that he was forced to strip off his clothing, in finding the confession involuntary. Thus, *Bram* does not support the conclusion that a plea bargain in which a promise of leniency is made automatically makes the defendant's statement involuntary.

Even later cases which have approved of the *Bram* dictum have not adopted a per se approach. In *Malloy* v *Hogan, supra*, the Court applied the Fifth Amendment to the states via the Fourteenth Amendment and stated that *federal standards governed* whether the self-incrimination privilege was properly invoked or not. *Brady* v *United States*, 397 US 742; 90 S Ct 1463; 25 L Ed 2d 747 (1970), approved of *Bram's* formulation, *but* the Court specifically determined that a guilty plea made in order to avoid the possibility of the death penalty was not per se involuntary. Rather, voluntariness had to be determined by looking at all the circumstances. More recently, *Hutto* v *Ross*, 429 US 28; 97 S Ct 202; 50 L Ed 2d 194 (1976), the Court rejected the idea that a statement made in connection with a plea agreement, but not required by the agreement, was per se involuntary.[2] In doing so, it overruled the Eighth Circuit's

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[2] The Court in *Hutto* noted:

"This case does not involve the admissibility at trial of a guilty plea subsequently withdrawn by leave of court. That issue was settled in *Kercheval* v *United States*, 274 US 220; 47 S Ct 582; 71 L Ed 1009 (1927), which held that such pleas could not be used as evidence of guilt at a subsequent trial. *Nor does this case involve the admissibility in criminal trials of statements made during the plea negotiation process.* See Fed Rule Crim Proc 11(e) (6); *Moulder* v *State*, 154 Ind App 248; 289 NE2d 522 (1972); ABA Project on Standards for Criminal Justice, Pleas of Guilty § 3.4 (Approved Draft of 1968)." 429 US 30, fn 3. (Emphasis added.)

It is interesting to note that both of the cases cited in the above quotation based their decisions on *policy grounds*, not constitutional grounds. The second proposition is of consequence to the immediate case. In *Moulder* v *State*, 154 Ind App 248, 258-259; 289 NE2d 522 (1972), the Indiana appellate court made a blanket rule that:

"Any communication relating to the plea bargaining process is privileged and inadmissible in evidence unless the defendant has subsequently entered a plea of guilty which has not been withdrawn."

(Footnote 2 continued on page 20a.)

determination of involuntariness because the statement "was made in connection with an offer to plead guilty and after a [plea] bargain had been agreed upon. *Mobley* v *Meek*, 531 F2d 924, 926 (1976)". 429 US 29. It then cited the *Bram* test. A per se approach is not supported by precedent. See also *United States* v *Grant*, 622 F2d 308 (CA 8, 1980).

Second, a per se approach is not justified in the plea bargaining situation, particularly in this case. My colleague extends *Bram's* rule to the plea bargaining situation, finding that because consideration in the form of a lesser charge, a recommended lighter sentence, and related benefits flow from the prosecutor to the defendant in a plea bargain, this consideration constitutes "direct or implied promises, however slight" thereby making the defendant's statement involuntary. This reasoning conflicts, however, with United States Supreme Court plea-bargain decisions and is inconsistent with the concept that a judicially accepted guilty plea *itself* is voluntary, even when made pursuant to promises of leniency.

In *Santobello* v *New York*, 404 US 257; 92 S Ct 495; 30 L Ed 2d 427 (1971), the Court discussed the importance and legitimacy of plea bargaining in the course of determining that a defendant's conviction in a state court cannot be upheld when he complies with a plea bargain but the

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(Footnote 2 continued from page 19a.)

The factual situation in that case differed from the immediate case, but the important point is that the court there first acknowledged the great importance of plea bargaining and then gave several policy considerations *for not allowing evidence of such negotiations*. The stated reasons are similar to the basis for our own MRE 410 and for FRE 410. Another important point in that case is that defense counsel made an objection to the presentation of a statement made in furtherance of a plea bargain on the grounds, basically, that it was unfair. See discussion below, section III.

prosecutor does not. *Cf. People* v *Reagan*, 395 Mich 306; 235 NW2d 581 (1975).[3] Fundamental fairness in securing an agreement and a sense of fair play were the basis for the *Santobello* Court's decision requiring the state court's judgment to be vacated, *not* the involuntariness of the plea.

> "However, all of these considerations presuppose fairness in securing agreement between an accused and a prosecutor. It is now clear, for example, that the accused pleading guilty must be counseled, absent a

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[3] My colleague also mentioned the importance of plea bargaining and the policy considerations of MRE 410 in promoting plea bargaining as well as candor in the process. Arguably, however, they are less forceful in a situation such as the immediate one where the defendant initiated the negotiations, voluntarily entered into a fair agreement, and then reneged on his bargain. McCormick, *Evidence* (2d ed), § 274, p 666 (1972) states:

> "*Effect of acceptance of offer of compromise.* If an offer of compromise is accepted and a contract is thus created, the party aggrieved may sue on the contract and obviously may prove the offer and acceptance. Moreover, if after such contract is made and the offering party repudiates it, the other may elect to sue on the original cause of action and here again it seems the repudiating party may not claim privilege against proof of the compromise. The shield of the privilege does not extend to the protection of those who repudiate the agreements the making of which the privilege is designed to encourage." (Citations omitted.)

We are not required to apply general contract principles to plea agreements. *People* v *Reagan*, 395 Mich 306, 314; 235 NW2d 581 (1975). However, if there is any weakness at all in applying those policy considerations to the immediate case, that weakness is magnified many times when one attempts to justify a per se rule.

I agree with Justice Kavanagh that plea bargaining has become a "component of the administration of criminal justice" in this state. Yet, it is inconsistent to determine that all statements made pursuant to plea bargains are involuntary and still support a system which, on that reasoning, produces only coerced statements. Given the apparent importance of plea bargaining and its approval by the United States Supreme Court and my brother himself (see *People* v *Briggs*, 416 Mich ____; ___ NW2d ____ [1982]), it is difficult to understand how this Court can today subscribe to the belief that a statement made pursuant to a plea bargain is per se involuntary.

waiver. *Moore* v *Michigan*, 355 US 155; 78 S Ct 191; 2 L Ed 2d 167 (1957).

* * *

"This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello, supra*, pp 261-262.

Justice Douglas, in his concurring opinion, recognized that a prosecutor's promise in a plea bargain situation could make a defendant's act involuntary, but only under certain circumstances, *not in every case*. He said:

"The decisions of this Court have not spelled out what sorts of promises by prosecutors tend to be coercive, but in order to assist appellate review in weighing promises *in light of all the circumstances*, all trial courts are now required to interrogate the defendants who enter guilty pleas so that the waiver of these fundamental rights will affirmatively appear in the record. *McCarthy* v *United States*, 394 US 459; 89 S Ct 1166; 22 L Ed 2d 418 (1969), *Boykin* v *Alabama*, 395 US 238; 89 S Ct 1709; 23 L Ed 2d 274 (1969)." *Santobello, supra*, p 266. (Emphasis added.)

In *Brady* v *United States, supra*, 397 US 751, the Supreme Court rejected the idea that a guilty plea was involuntary because it was entered under the fear that the possibility of death could only be avoided that way. It

found that the totality of the circumstances had to be examined to make a determination whether the plea was voluntary, and it specifically said that insofar as the voluntariness of the defendant's plea was concerned, there was little to differentiate the defendant in that case from a defendant who is permitted by the prosecutor and judge to plead guilty to a lesser included offense, or a defendant who pleads guilty to certain counts under the understanding that other counts will be dropped. In other words, there is no substantive difference between a defendant who pleads guilty to avoid the possibility of death and one who plea bargains as far as the voluntariness of the plea is concerned. If that is true, certainly that reasoning applies equally to statements made pursuant to a plea bargain.[4]

The *Brady* Court, in its analysis, also rejected the idea that a "but for" connection between a guilty plea and its inducement — the apprehension of death by electing a jury trial — was sufficient to make the plea involuntary. This test is really the one used in a per se rule and is the test implicit in the *Bram* dictum; however, as noted before,

[4] To say that a statement made during the course of a plea bargain, no matter who initiates the negotiations, is involuntary merely because such statements are induced by a promise of leniency seems contrary to the very idea of a voluntary guilty plea. There is no logical distinction between a guilty plea before a judge and a statement made pursuant to a plea bargain. *Cf., People* v *George*, 69 Mich App 403; 245 NW2d 65 (1976). Under GCR 1963, 785.7(2), a court accepting a guilty plea must determine that it is indeed voluntary. If the mere fact that a promise induced a plea bargain makes statements pursuant to it involuntary, then, logically, a guilty plea made with the understanding that a prosecutor's promise of leniency will be followed is also involuntary. Both statements are made because of the promise. But, we have seen that a guilty plea entered pursuant to a plea agreement is not necessarily involuntary. See *e.g., Hutto, supra.*

Brady did not literally apply that dictum.[5] Supreme Court case law subsequent to *Brady* and involving plea bargaining has clearly rejected the idea that merely because a defendant chooses to plea bargain — to receive some consideration from the sate in order to bestow a benefit on the state — the plea is involuntary.[6]

Furthermore, under the facts of this case, a per se rule is particularly inappropriate. The defendant here initiated the negotiations for the plea of guilty. He is the one who refused to go through with the agreement. There were no allegations that the agreement itself was unfair, and the trial court specifically found the defendant's story that Sergeant Darby forced him to make the statement totally incredible. Jones was not unfamiliar with police practices or the legal system; as the trial judge found, he was street-wise. Three times he was informed of his *Miranda* rights, and he volun-

[5] It is possible that this later case law refusing to follow *Bram* literally may be a response to the legitimacy of plea bargaining today since the Court has recognized that is not constitutionally impermissible, *Santobello, supra*, while at the time *Bram* was decided it was not widely accepted is legitimate. As my colleague has noted, plea bargaining is, at the present time, "an asserted component of the administration of justice". Given its importance, the United States Supreme Court obviously realized the devastating effect a finding that a guilty plea was involuntary would have simply because it was influenced by a "promise of leniency" or "by the fear of a possibly higher penalty for the crime charged if a conviction is obtained after the state is put to its proof". *Brady, supra*, pp 750-754. See also *Hunter* v *Swenson*, 372 F Supp 287 (WD Mo, 1974), *aff'd on other grounds* 504 F2d 1104 (CA 8, 1974), *cert den* 420 US 980; 95 S Ct 1410; 43 L Ed 2d 662 (1975).

[6] *Hutto* v *Ross*, 429 US 28, 30; 97 S Ct 202; 50 L Ed 2d 194 (1976). The Court stated:

> "The Court of Appeals reasoned that respondent's confession was involuntary because it was made 'as a result of the plea bargain' and would not have been made 'but for the plea bargain.' *Id.*, pp 927, 926. But causation in that sense has never been the test of voluntariness. See *Brady* v *United States*, 397 US 742, 749-750; 90 S Ct 1463; 25 L Ed 2d 747 (1970). The test is whether the confession was ' "extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] by the exertion of any improper influence." ' *Bram* v *United States*, 168 US 532, 542-543; 18 S Ct 183; 42 L Ed 578 (1897); See *Brady* v *United States, supra*, p 753; 90 S Ct 1463; 25 L Ed 2d 747."

tarily waived his rights to counsel and to remain silent. Case law has indicated that, under facts such as these, the appropriate test is the "totality of the circumstances" test and not a per se rule that any statements given under a plea bargain agreement are involuntary.[7]

There is absolutely no justification for the creation of a per se rule in this case modifying the traditional "totality of the circumstances" test. Precedent does not support the imposition of such a rule, and indicates instead that such a rule is improper. My colleague disavows basing his decision on MRE 410, but the effect of his reasoning is to constitutionalize MRE 410. Such a step is unwarranted.

III

We find that reversal is still mandated, however. MRE 410 states:

> "Except as otherwise provided in this rule, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to

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[7] *Hunter* v *Swensen*, 372 F Supp 287 (WD Mo, 1974), *aff'd on other grounds* 504 F2d 1104 (CA 8, 1974), *cert den* 420 US 980; 95 S Ct 1410; 43 L Ed 2d 662 (1975); *State* v *Jordan*, 114 Ariz 452; 561 P2d 1224 (1976), *vacated on other grounds* 438 US 911; 98 S Ct 3138; 57 L Ed 2d 1157 (1978); *State* v *Harwick*, 220 Kan 572; 552 P2d 987 (1976); *Taylor* v *Commonwealth*, 461 SW2d 920 (Ky App, 1970), *cert denied sub nom Brown* v *Kentucky*, 404 US 837; 92 S Ct 126; 30 L Ed 2d 70 (1971); *People* v *Langford*, 76 Mich App 197; 256 NW2d 578 (1977), *cert denied* 440 US 964; 99 S Ct 1512; 59 L Ed 2d 779 (1979); *State* v *Hutson*, 537 SW2d 809 (Mo App, 1976).

plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement."

We agree with Justice Kavanagh that, under this rule, the defendant's statement could not have been used against him, even though defense counsel did not rely upon MRE 410 in registering his objection at trial.

At the time of the trial, MRE 410 had been in effect for less than four months — since March 1, 1978. MRE 410 also changed the common-law rule in excluding statements made in connection with guilty pleas and offers of guilty pleas.[8] Having failed to cite the newly adopted rule of

[8] The common-law view was that "an offer of compromise of a criminal charge * * * may be received in evidence", 22A CJS, Criminal Law, § 736 p 1086, clearly implying that statements made in connection with the offer were also admissible. This is different from the civil case where statements made in connection with an offer to compromise, as well as the offer itself, were not admissible unless they were not made for settlement purposes or were independent facts admitted by the party during negotiations. *Sanderson* v *Barkman*, 272 Mich 179; 261 NW 291 (1935). 11 Michigan Law & Practice, Evidence, § 133, p 291.

It is true that in Michigan, before the Michigan Rules of Evidence became effective, a previously withdrawn guilty plea could not be commented upon or introduced by the prosecutor. *People* v *Street*, 288 Mich 406; 284 NW 926 (1939). However, research does not reveal any cases determining whether statements made in connection with a guilty plea or an offer to plead guilty were admissible, except for *People* v *George*, 69 Mich App 403; 245 NW2d 65 (1976). In *George*, the Court of Appeals reversed the defendant's conviction, which was based upon a judicial statement providing a basis for the defendant's later-invalidated guilty plea. The court could see little difference between a guilty plea and an incriminating statement made pursuant to a guilty plea, and this rule was adopted on *policy* grounds, not constitutional grounds. *George* cited no Michigan precedent on point. It was new law which looked to Federal Rule of Evidence 410 for support.

The federal evidentiary rule is similar to MRE 410. In the Report of the Senate Committee on the Judiciary for FRE 410, the committee objected to the House committee's proposal to exclude all statements made in connection with guilty pleas or offers to plead. Rather, it believed certain *voluntary* statements should be admissible. A compromise was reached allowing the admission of statements in subsequent criminal proceedings for perjury or false statement. *Federal Rules of Evidence for United States Courts and Magistrates*, pp 39-40 (1979).

evidence, defense counsel registered the best objection available to him: that the statement was involuntary. He was correct in his belief that the defendant's statement was inadmissible. He merely cited the wrong basis. MRE 410 is based on the idea that plea negotiations should be encouraged, not unduly hampered by the fear that any statement as well as any plea could subsequently be used against a defendant. It is also based on a sense of fairness. To affirm the conviction in this case would violate that sense of fair play and would exalt procedural niceties over the substantive policy of plea bargaining. The particular facts of this case require a reversal, but not because the defendant's statement was per se involuntary. Given the newness of MRE 410, the change it effected in the common law, and the fact that defense counsel registered a timely, if inaccurate, objection, I would reverse Jones' conviction and remand to the trial court for a new trial.

(s) JAMES RYAN
(s) JOHN FITZGERALD
(s) MARY S. COLEMAN

Court of Appeal's Opinion

STATE OF MICHIGAN
COURT OF APPEALS
Filed April 25, 1980

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

No. 78-3255

JESSE JAMES JONES,
Defendant-Appellant.

Before: M.J. Kelly, P.J., and Walsh and Beasley, JJ. Per Curiam

Defendant Jesse James Jones was charged with first-degree murder, contrary to MCL 750.316; MSA 28.548. He was convicted of that charge by a Genesee County Circuit Court jury in proceedings that concluded on June 29, 1978. On July 18, 1978, defendant was sentenced to a mandatory term of life imprisonment.

The conviction was based in part on a statement by defendant while in custody on April 28, 1978. Prior to trial, defendant filed a timely motion to suppress the contents of the statement and a hearing was conducted to determine its admissibility, in accordance with *People* v *Walker*, 374 Mich 333; 132 NW2d 87 (1965). Defendant now contests the propriety of the trial court's decision which found that his statement was in fact voluntarily given.

The proper standard of review is set forth succinctly in *People* v *Robinson*, 386 Mich 551, 557; 194 NW2d 709 (1972):

> "In any event, the sole purpose of the *Walker* hearing is to determine the fact of voluntariness and a reviewing court is concerned only with the correctness of that determination. The role of the reviewing court is

accurately stated in *People* v *Summers*, 15 Mich App 346, 348 (1968):

> " 'On this appeal we are required to "examine the entire record and make an independent determination of the ultimate issue of voluntariness." [citations omitted]' "

The Supreme Court has reaffirmed this position and stated that unless it possesses a "definite and firm conviction that a mistake was committed by the trial judge in his ruling, we will affirm that ruling." *People* v *McGillen, #1*, 392 Mich 251, 257; 220 NW2d 677 (1974).

Within the perimeters of this standard of review, this Court has held that the voluntariness of a confession is to be determined from "the totality of the circumstances." *People* v *Cutler*, 73 Mich App 313, 318; 251 NW2d 303 (1977), *People* v *Inman*, 54 Mich App 5, 8; 220 NW2d 165 (1974).

Application of the foregoing test to the case at bar reveals that the trial court was not in error in its determination. That conclusion is justified in light of the decision in *People* v *Langford*, 76 Mich App 197 (1977), *lv den*, 403 Mich 835 (1978), *cert den*, 99 S Ct 1512 (1979). In reviewing the record in accordance with the *Langford* decision, we find the following factors support the trial judge's determination.

First, it is important to emphasize that it was the defendant who initiated discussions with regard to concessions that might be made if he were to give a statement. The prosecuting authorities did not seek, encourage or solicit a plea bargain or statement prior to the inquiries by defendant.

Second, defendant was fully informed of his *Miranda* rights several times. Prior to the commencement of the interview, during the course of the informal statements, and

during the formal statement which was subsequently submitted into evidence, defendant was fully apprised of his constitutional rights.

Third, defendant made a voluntary, knowing and intelligent waiver of those rights.

Fourth, contrary to the argument of defendant, the record does not disclose duress or coercion so as to derogate the voluntary nature of the statement.

Fifth, the incriminating statement was part of an abortive plea bargain, as defendant subsequently refused to fulfill the conditions he had agreed to.

Sixth, the bargain struck, which ultimately led to the statement given, was at all times intended and able to be fulfilled by the prosecuting authorities.

Although several of the foregoing conclusions were subject to dispute at the suppression hearing, the record clearly supports the trial judge's decision. The trial judge determined that the confession was not involuntary or otherwise induced by illicit promises. While it is proper that we should review the record and make our own independent determination of voluntariness, we will accord considerable weight to the determination of the trial judge where credibility of witnesses is involved. *People* v *Jordan*, 34 Mich App 360, 369 (1971), *People* v *Hummel*, 19 Mich App 266, 270 (1969).

Based on the foregoing, we conclude that the trial judge was not clearly erroneous in his determination that the statement was voluntarily given by defendant. The totality of the circumstances as disclosed by the entire record justified the result.

The issue raised by appellee with regard to the applicability of MRE 410 is not properly subject to review. Failure to raise this issue in the proceedings below precludes review. *People* v *Stinson*, 88 Mich App 672, 674 (1979), *Gomez* v *Campbell Foundry*, 78 Mich App 145, 149 (1977).

Affirmed.

Trial Court's Finding–Confession Admissible
Excerpts from Transcript of proceedings of June 23, 1978

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF GENESEE

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

-vs-

JESSE JAMES JONES,
Defendant.

Circuit Court
No. 78-28317-FY

Judge: Elliott

(WHR 106)

TRIAL COURT'S FINDING—CONFESSION ADMISSIBLE

THE COURT: Okay. I am not going to make many remarks at this time. I will either write or record at the commencement of the trial Tuesday my opinion in the matter.

I will say that the defendant's statements and testimony here today strikes me as being patently false and absurd. As I understand his testimony, he would want me to believe that he actually knows nothing about what happened inside the drugstore at the time of the killing; that Sergeant Darby wrote out a scenario or script, and had Jones read it, with the end of having Mr. Jones go before a stenographer and recite from memory events of the crime as they are set forth in this statement so that Mr. Jones could plead guilty to Manslaughter for this crime he knows nothing about, and two men that he knows will be on trial for murder based upon his testimony.

That comes very close to the most ridiculous story I have ever heard in the twelve and a half years that I have been a—or eleven and a half I have been a judge in this court. Just reading a few of his answers on Page 9 to the questions—Of course, I don't think it is necessary for me to do this late in the afternoon—shows how ridiculous that is.

Even if he were a skilled actor, it is ridiculous to suppose that he would cop to a 15-year felony (WHR 107)

of Manslaughter, testify against a couple of his acquantances, and read a script to a reporter just so the police officer would let him alone.

There is, however, a question about whether a confession is rendered inadmissible because it is preceded by a discussion concerning possible leniency to the confessor if he confesses and becomes a witness against others.

And, I am personally satisfied that his confession was completely voluntary. At the time he made it, he thought it was in his best interest. Chances are, it was in his best interest. Probably the best thing he could do is go ahead with what he started out to do; but somewhere along the line; he's changed his mind.

There was no physical coercion. He says depressed. I don't believe anything that he says. It is natural that a person in jail would be depressed.

His Miranda Warnings were told to him time and again; he was fully aware of them. The police officer didn't make any statements to him that he didn't endeavor to be certain of. He called the prosecutor, and told him exactly what the prosecutor told him; and he contacted the federal agent and had him come over.

And, the man was told, out of the mouth of the federal agent, whatever concession might be given with respect to that charge. Everything was done openly, (WHR 108) truthfully, fairly. And, Mr. Jones thought it over and decided to tell what he knew, and did.

I think it ought to be receivable in evidence. But, I want to check some law before I decide fully, because it is a question that I haven't considered before. So, be prepared to commence the trial with the confession being received in evidence.

If over the weekend I decide, under the law, it can't be received, I will tell you that first thing Tuesday morning.

MR. NEITHERCUT: Thank you, Judge.

THE COURT: You are welcome. * * *

Excerpts from Trial Transcript of June 27, 1978

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF GENESEE

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

-vs-

JESSE JAMES JONES,
Defendant.

Circuit Court
No. 78-28317-FY
Judge: Elliott

(R 6)

Flint, Michigan
Tuesday, June 27, 1978
8:33 o'clock A. M.

THE COURT: Okay.

I will call People versus Jesse James Jones, Jr., and the first order of business would be to announce my decision on the question raised at the suppression hearing last Friday. I may write the decision, but I have not had time to fully write an opinion. I am going to, however, read the findings of facts that I have written out and state the legal conclusions that I have reached.

I may as well start by saying that I do find that the confession is admissible.

I find as follows: First, defendant's testimony was untrue at the suppression hearing; second, his confession was obtained as follows:

Defendant had been arrested on a federal firearms charge and for carrying a concealed weapon and was lodged in jail on April twenty-seventh and interviewed about the weapons charge only by (R 7) Flint Officer Ahearne and Federal Agent Vince. On April twenty-eighth, the weapons charges were assigned to Flint Detective Darby, who interviewed Jones beginning at one forty-eight in the afternoon. Jones was fully advised on his Miranda Rights, and he voluntarily waived his right to counsel and said he wanted to discuss the charges.

Excerpts from Trial Transcript of June 27, 1978

They talked about the weapons charges for forty-five minutes, or longer. Darby told Jones that Jones was a suspect in the Hockstead Pharmacy homicide and that Darby had received information over a period of time that made Jones a suspect. Darby asked Jones if he wanted to discuss that crime and told him that he was still under the Miranda Rights.

Jones said that he would be more than willing to discuss it because he did not know anything about it. The discussion then went back to the weapons charges, and Jones wanted to know what the penalty was for the weapons crimes for which he had been arrested. Darby told Jones that the federal firearms charge had a ten-year maximum and that the state charge had a possible sentence of five years.

Jones asked about his parole (R 8) violation and was told that he could possibly get some time for parole violation. Jones then asked what Darby could do to give Jones consideration if he was able to tell certain things that he knew about the Hockstead homicide. Darby told him that if all he was going to tell was things that he had heard on the street, that nothing could be done and that it was really out of Darby's hands and Darby would have to contact the prosecutor's office before any consideration could be given him and it depended upon what he wanted to tell.

Jones then said he knew a great deal and could clear up the case, so Darby telephoned the prosecutor's office and talked to Chief Assistant John McGraw. Darby explained the situation to McGraw who told Darby that if Jones gave a statement implicating himself and if he would testify against anyone else involved in the crime, that there was a very real possibility that Jones would be allowed to plead guilty to manslaughter. Darby told Jones exactly what McGraw had said.

Darby then telephoned Vince, the Federal Agent, to learn the exact penalty for the federal crime and Vince agreed to come to the (R 9) police station. This call occurred around three o'clock or perhaps later.

Excerpts from Trial Transcript of June 27, 1978

When Vince arrived, he met Darby and Jones. Jones asked what consideration he could be given on the federal firearms charge if he assisted the Flint Police in the Hockstead's case. Vince testifeid that he said he could not personally promise anything but he would talk to the U. S. Assistant District Attorney and told Jones that if he fully cooperated with the Flint Police, that fact would be taken into consideration. We think Jones was told more than this and was lead to believe that the weapons charges would be dropped.

Jones told Vince and Darby that he was willing to cooperate. Vince left. Darby then fully advised Jones of his Miranda Rights and Jones voluntarily waived his right to counsel and agreed to tell all he knew about the Hockstead's homicide. He told Darby about that crime while Darby took notes. That statement was completed at five-twenty P. M.

Darby then telephoned an off-duty police stenographer who came to the station to take a formal statement from Jones. (R 10) Jones and Darby went to her desk where the formal statement was made from six-fifteen to seven-oh-nine P. M. It begins with the Miranda Warnings and defendant's waivers of his right to counsel and his right to silence. It is apparent that Jones is unwilling to admit that the robbery was discussed before it was attempted, preferring to say only that Louis Henry or Louis Ford, whichever his name is, kept saying he wanted to do something, although Jones finally admits, "yeah, I know what he had in his mind."

Jones' narration of the events immediately before, during and after the robbery attempt and killing leaves no doubt that he was personally present and knows what happened because of his participation. He may, however, be self-serving by putting all the blame for the killing on Louis Ford.

The typed statement ends with a recitation of the agreement that had been made concerning the charges and is preceded with the following interesting question and

answer, especially the answer, volunteering his—the voluntariness of his confession. He was asked: Is there anything regarding his matter that I (R 11) have not asked you that we talked about earlier and you can think of now that should be brought out? The defendant answered: We were talking, said I would talk to you; I stated everything voluntarily, unless there is a question you, out of your curiousity, wanted to know and myself filling out.

That's all I am going to quote of the last part of the confession.

I find that defendant's—well, this should be finding three—I find that defendant's waiver of his constitutional rights and statements was completely voluntary, although he was induced by promises that the weapons charges would be dropped and that there was a very real possibility that he would be allowed to plead guilty to manslaughter if he also testified against the others involved. Despite the words, "very real possibility," we find that the inducement was sufficient that the prosecution would be required to fulfill that agreement if the defendant had not changed his mind and repudiated the agreement.

In fact, I want to have Miss Fullerton now put on the record whether or not the prosecution is willing to go ahead with the (R 12) agreement.

MISS FULLERTON: Yes, your Honor, we are.

THE COURT: Okay.

Five, the agreement did not render his choice to make the statement involuntary. Rather, it made his voluntary decision to confess to a felony murder intelligent and reasonable for him to solve the four-month old murder investigation. The statement was not compelled in any way. It was not obtained by trickery or deceit or threats or extended questioning or by any other improper means. The period of time that afternoon, considering the time out for the calls and the arrival of Vince, seems perfectly reasonable.

Seven, Jones is street-wise. He was in full possession of his faculties, not under the influence of any dope or any alcohol, and he is experienced in criminal proceedings. He

initiated the discussion about consideration to be given, saying that he knew a great deal about the killing and could clear up the case, but, naturally, he was unwilling to describe his participation in the felony murder unless there was an (R 13) understanding that made his cooperation seem worthwhile to him.

Eight, the concessions made to defendant were not designed to coax him into furnishing evidence against himself. The police and prosecutor rather desired to obtain a conviction of all of the persons who were involved in that crime. The agreement with the defendant was a necessary step to obtain a prosecution witness against the other men who were as guilty or more guilty than he was.

The problem confronting the police and the prosecutor could not have been solved by allowing defendant to simply plead guilty to manslaughter without a full and true statement of how the crime happened and about who else committed it, without a commitment from the defendant to be a witness against those others.

Finally, nine, the defendant has been permitted the benefit of his plea agreement and it is he who refused to abide by it. As the prosecutor has stated on the record here today, he still can have that agreement.

Now, concerning the law, I have not had time to write out much of anything, (R 14) but I want to cite a couple of case that were furnished to me by the prosecutor yesterday in zerox form. I had no conversation with her, but she handed these zerox copies to my clerk. The case that I am simply going to mention is State of Missouri versus Hudson, 537 S. W. 2d 809; and the next case, from which I am going to read quite a bit, is Hunter versus Swenson, 372 Federal Supplement 287, a nineteen seventy-four case.

Written at the top of it—and I assume it's true—is that certiorari was denied at 420 U. S. 980.

I want to commence what I am going to read on page three-hundred, and I will omit citations. The case says: Fourthly, assuming that a promise of leniency was made or that Hunter reasonably believed that a promise had been

made, and further assuming that a but-for relationship existed between the promise or belief and the statement, the inducement for the statement was not constitutionally impermissible because it was not coercive. More than a but-for relationship is required to bar an admission or confession from evidence. The Fifth Amendment does not condemn all promise-induced admissions and confessions; (R 15) it condemns only those which are compelled by promises of leniency. This is amply illustrated by the Supreme Court's treatment of promise-induced guilty pleas; that is, judicial confessions. The mere fact that a guilty plea is induced by a promise of leniency does not render the plea involuntary. The question in plea-bargaining situations is not whether the guilty plea would have been made but for the promise of leniency; but whether the promise was coercive in nature; that is whether the accused was so gripped by the hope of leniency that he did not or could not freely and rationally choose among the available courses of action.

I was going to read the entire remainder of the decision, but I don't think I will. It will just take time and it is a matter of record anyway and anybody that wants to read it can.

In this case, I specifically find that defendant was not so gripped by hope of leniency that he did not or could not freely and rationally choose among the available courses of action. He did freely and rationally choose to make his confession, so it will be admitted. * * *

Judge's Remarks on July 5, 1978

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF GENESEE

PEOPLE OF THE STATE OF MICHIGAN

vs.

JESSE JAMES JONES JR.
Defendant.

Judge Elliott
No. 28317-FY

JUDGE'S REMARKS ON JULY 5, 1978

I wish to add some thoughts to the findings of fact that I stated on the record before the trial. What follows are my reasons for believing the cases I cited reached the right conclusion. They were *Missouri* v *Hutson*, 537 S W 2d 809 (1976) and *Hunter* v *Swenson*, 372 F Supp 287 (1974).

The question presented is whether a quotation from "Greenleaf" in 1897, in *Bram* v *U.S.*, 168 US 532, 72 L Ed 568, 18 S Ct 183, that a confession must be "free and voluntary; that is must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence" bars from evidence the confession in this case. The basic facts are:

After full explanation and waiver of "Miranda" rights and warnings, defendant was questioned about two gun charges and then asked if he would talk about the Hockstead homicide. Defendant initiated the plea bargain by asking what consideration would be given to him if he cleared up the case. The detective contacted a prosecutor and federal agent and defendant was advised, exactly and honestly, that the federal and state gun charges would be dropped and he could plead to manslaughter if his confession implicated himself and he was willing to testify against the others involved. Defendant was experienced in criminal matters; he knew his rights and he knew about plea bargaining. He is intelligent and was not under the influence of

drugs or alcohol. A reward had motivated tips that defendant and two others were involved but neither witness could identify anyone and after four months there was little or no chance that anyone would be charged unless defendant talked. If his confession is not admissible there would be no chance of a conviction. The plea offer to defendant was primarily to obtain his testimony as a witness against his accomplices; his confession would not be needed for use against him because he was expected to plead to manslaughter. He accepted the plea offer and told what happened in a self-serving way, but his story shows conclusively that he was personally involved at the robbery-murder. He related details that were unknown to the detective who later verified them. There was no pressure or extended interrogation, no force, threat, trickery, deceit or other improper influence. Rather, defendant asked what consideration he could get, was truthfully told and he agreed. Later he refused to go ahead with the plea bargain or testify, and he made the preposterous claim that he read a statement written by the detective and then gave that statement before the reporter from memory so he would be left alone. Yet even on the morning of the trial the prosecutor acknowledged a willingness to fulfill the bargain and allow defendant to plead to manslaughter.

About two out of every three cases bound over for trial in Circuit Court are disposed of by a plea bargain. It is almost unheard of for anyone to plead guilty to a charge "on the nose", without reduction, unless other charges will be dismissed or a sentence concession has been agreed (although I personally follow only the ABA Standard procedure). Until a few years ago, the procedure worked as described in "The Lawyers" (1966) by Martin Mayer:

" 'Plea bargaining', as this process is called, is the central phenomenon of the American system of criminal justice. Oddly enough, it has no legal standing.

'Maybe the most common crime in America' says a New York lawyer who takes occastional court-assigned

criminal cases, "is the perjury of the defendant who swears before the judge that he hasn't been promised anything in return for his plea of guilty." It is not that the judges do not know what has been going on normally, they do, and may even have been consulted—but that without such a statement in open court a convict may later take the option of appealing for a new trial on the grounds that his guilty plea was induced."

Fortunately such a charade no longer is required. Plea bargaining is in the open as a result of *Brady* v *US*, 25 L Ed 2d 747 (1970), *Santobello* v *N.Y.*, 30 L Ed 2d 427 (1971), ABA Standards PLEAS OF GUILTY, Federal Rules of Criminal Procedure, Rule 11 and the latest revision of General Court Rule 785. The notion that a plea of guilty was involuntary if it was induced by a promise now seems quaint. Open plea bargaining has not resulted in conviction of innocent persons. Rather, plea bargaining greases the wheels of justice and allows the system to function as long as the prosecutor does not regularly offer too good a deal losing public confidence in the ability of the law to protect society. There must be some benefit to a person accused of crime for him to admit his guilt and give up his chances at a trial and appeal with a free lawyer. Law abiding people rarely act against their interests, without a reason, and criminals almost never do. Even in the old days when a defendant might plead guilty without an agreement and "throw himself upon the mercy of the court" he had an encouraged expectation that his plea would reduce the sentence he would get if he went to trial and lost.

I believe that a criminal, such as the defendant, faced with a serious crime, such as robbery-murder, who is experienced in plea bargaining, who knows his rights and who is not crazy, is not going to cooperate with the police, snitch on his friends and put himself down for a term of life imprisonment, if the police interrogation is conducted in full accord with *Miranda*, if it is free of any force, threats, tricks or deceit and if it must also be free of "any direct or implied promise, however slight" as *Bram* literally requires.

Judge's Remarks on July 5, 1978

Faced with this reality and the suspicion that defendant and his pals were getting away with murder, I do not blame the detective and prosecutor for answering the defendant's question about what deal he could make with an offer of a reasonable plea bargain that looked to conviction of others and that required the defendant to accept the punishment for a serious but lesser degree of homicide. It was not a deal that would seduce an innocent man into a false confession. He would be required to be a witness against his partners and undergo cross examination and spend a lot of time in prison. I cannot think of anything else the law enforcement officials could have done with any hope of enforcing the law that also would be honest and fair with the defendant. Frankly, a confession claimed to be without "any direct or implied promise, however slight" would be far more suspicious than the bargained-for confession of Jones. All of the law's concern should not be spent on defendants; the concept of justice is insulted when the guilty go free as well as when the innocent are convicted.

I think the *Bram* dictum is an unrealistic, unwise policy aimed against the public interest with a tendency to demoralize police and lead them away from fair and authorized procedures and into perjury at *Walker* hearings. I would rather have the honest admission of a plea agreement, such as the testimony of Detective Darby, than testimony, like the federal agent's, that no promises were made when I believe promises were made.

The *Hutson* and *Hunter* cases, cited above, show the way to a sensible approach. Although *Hutto* v *Ross*, 429 US 28, 50 LEd 2d 194, 97 S Ct 202 (1976) reiterates the *Bram* dictum, there is not much difference, really, between that case and this case. We think the proper test should be the following one from *Rogers* v *Richmond*, 365 US 534 81 S Ct 735, 5 L Ed 2d 760 (1961):

> "The inquiry to be made under the circumstances . . . is whether the alleged inducements . . . were of a nature which necessarily overcame appellant's ability to make a voluntary decision."

Judge's Remarks on July 5, 1978

The law has come to openly allow inducements for pleas of guilty. It is time to realize that a confession may be voluntary although obtained by a plea bargain promise. Of course, the state must not withdraw from the plea agreement after obtaining the bargained-for confession unless the defendant backs out first.

July 5, 1978

(s) PHILIP C. ELLIOTT
Circuit Judge

Testimony of Joseph J. Vince

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF GENESEE

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

-vs-

JESSE JAMES JONES,
Defendant.

Circuit Court
No. 78-28317-FY
Judge: Elliott

EXCERPTS OF WALKER HEARING TRANSCRIPT RE ADMISSIBILITY OF RESPONDENT'S CONFESSION JUNE 23, 1978

TESTIMONY OF JOSEPH J. VINCE

(WHR 10)

JOSEPH J. VINCE, called as a witness on behalf of the People herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Ms. Fullerton:

Q. Sir, would you tell this Judge your full name, please.

A. My name is Joseph J. Vince.

Q. And where do you work, sir?

A. I'm a special agent with the Bureau of Alcohol, Tobacco and Firearms, United States Treasury Department.

Q. And where are you assigned?

A. At the Flint resident office.

Q. Were you so employed on April the 27th of 1978?

(WHR 11)

A. Yes, ma'am, I was.

Q. And how about April 28th of 1978?

A. I was at that time, also.

Q. Do you recall if you had occasion to be contacted by Lieutenant Ahearne of the Flint Police Department regarding an arrest on a firearms matter on April 27th of 1978?

A. Yes, ma'am, I was.

Q. And about what time of day were you contacted by Lieutenant Ahearne, sir?

A. Sometime—I believe it was in the evening hours.

Q. And did you at that time on that day, April 27th, do anything with regard to the arrest that Lieutenant Ahearne informed you of?

A. Yes, ma'am. I did a preliminary investigation concerning a possible violation of a Federal Firearms Act.

THE COURT: You can go ahead and until we find out what it is.

Q. (By Ms. Fullerton, continuing:) Did you have occasion to learn the name of the person whom Lieutenant Ahearne had arrested?

A. Yes, ma'am, I did.

Q. What was the name?

A. Jesse James Jones, I believe.

Q. Did you ever have occasion to meet Mr. Jones in April of 1978?

* * *

(WHR 15)

A. Yes, ma'am, that is correct.

Q. And then did you personally have some conversation on the 28th in the afternoon in the presence of Sergeant Darby with Mr. Jones?

A. Yes, ma'am, I did.

Q. And what was your conversation with Mr. Jones about?

A. Sergeant Darby had asked me to advise Mr. Jones what the federal violations were, the violations of the law, and the penalties that went along with those violations, which I did.

Q. And then did you get a statement from Mr. Jones regarding that matter, the firearms violation?

A. No, ma'am, I did not interview Mr. Jones at that time concerning anything.

Q. Okay. Did you have any other discussions with Mr. Jones on the 28th?

A. After I advised Mr. Jones what the violations of federal law concerning the illegal possession of a firearm, et cetera, I was then asked by Mr. Jones something to the effect of what consideration he could receive if he assisted Sergeant Darby in—in another investigation.

Q. Did you know what that other investigation was?

A. Yes, ma'am, I did.

Q. And did Mr. Jones specifically mention to you what (WHR 16) the other investigation was, if you can recall.

A. I—I do not recall that.

Q. And what did you tell Mr. Jones when he asked you about consideration?

A. I advised Mr. Jones that I could not personally give him any promises or anything like that, but that I had talked to the United States Attorney, Harold Johnson, and he advised me that if Jones cooperated with the police fully in the other investigation that this would be taken into consideration.

At that time, also, I advised Mr. Jones, as I advise any witness that I talk to, or any suspect that I talk to in this area, that I certainly am not the judge and I cannot make any promises to him or what a sentence would be or whether the judge would take this kind of agreement or anything to that effect.

Q. Then what happened after this discussion?

A. At that time, Mr. Jones said he was willing to cooperate with Sergeant Darby but that he would like to give his information to Sergeant Darby without me present. At that time, I departed Sergeant Darby and Mr. Jones.

THE COURT: You what? Departed them, you say?

THE WITNESS: Yes, I left the office at that time, sir.

Q. (By Ms. Fullerton, continuing:) Did you personally (WHR 17) have any occasion to discuss—I should say interview—or interrogate Mr. Jones regarding any aspect of the Hockstad Pharmacy attempted robbery and murder?

A. No, ma'am, I did not.

Q. Were you personally present during any such interrogation or investigation?

A. No, ma'am, I was not.

MS. FULLERTON: Okay. I have no further questions of Special Agent Vince.

THE COURT: Okay.

Would you use the podium, please.

MR. NEITHERCUT: Yes, Judge.

CROSS EXAMINATION

By Mr. Neithercut:

Q. Can you tell me, Mr. Vince, this second interview that you had with Mr. Jones, the—at the time that you explained the nature of the charges to him, did you also read him his rights at that time?

A. No, sir, I don't believe I did.

Q. Why was it that you appeared on that day for that interview, can you tell me that?

A. Yes, sir. I was requested to appear there by Sergeant Darby.

Q. And did he tell you why he was requesting you to appear?

(WHR 18)

A. Yes.

Q. Previous to your getting there?

A. Yes, sir.

Q. What were the reasons?

A. I believe he advised me that the suspect, Mr. Jones, requested consideration for the pending charges against him for assistance in the Hockstad investigation.

Q. So Lieutenant Darby told you before your April 28th interview that Mr. Jones had requested some consideration on the Federal Firearms charge if he gave information about the Hockstad murder and attempted robbery charge?

A. Yes, sir, that's correct, Sergeant Darby.

Q. And did Sergeant Darby tell you just what kind of information he advised that he could give you?

A. No, sir. He asked me what could be done, and I advised him that I'd have to speak to the United States Attorney, Harold Johnson.

Q. This is Sergeant Darby that asked you?

A. Yes, sir.

Q. Sergeant—So in effect Sergeant Darby was asking you if you could make some kind of deal for Mr. Jones if he would help out with this attempted robbery and murder matter?

A. He was asking me what could be done, and I couldn't give him an answer; so he asked me if I would find out and meet him over there, which I did.

(WHR 19)

Q. Now, when Mr. Jones—After you explained the nature of the federal charges to him, you stated that he asked what consideration would he receive if he assisted in another matter. Did he describe what that other matter was at that time?

A. Yes. In the conversation between Mr. Jones and Mr. Darby to me, this Hockstad investigation was discussed.

Q. Who brought the subject up, Mr. Jones or Mr. Darby?

A. Concerning what, sir?

Q. The Hockstad investigation?

A. I don't recall, sir.

Q. Mr. Vince, were you advised later on that Mr. Jones had offered some information towards the Hockstad matter?

A. Yes, sir, I was.

Q. And at that time, did you make any offers to drop the federal firearms charges?

A. No, sir.

Q. Did you make any sort of offer of any nature at that time?

A. No, sir. I'm not—I'm prohibited by Bureau policy to make offers of any type. That has to come through the United States Attorney's Office.

Q. Did you discuss that matter further with the United States Attorney after you learned that he had given certain information?

(WHR 20)

A. No, sir, I did not.

THE COURT: Would you see if the mike over on this side is working (Indicating)

MR. NEITHERCUT: This is the amplifying mike?

THE COURT: Yes. It's not working. See if the switch is on.

MR. NEITHERCUT: It is off.

It is on. Testing, 1, 2—

THE COURT: Still doesn't seem to be working.

MR. NEITHERCUT: I have both switches on. Now it works.

THE COURT: Now it works.

MR. NEITHERCUT: Okay. Do I speak loud enough?

THE COURT: It is fine.

MR. NEITHERCUT: I have no further questions, Judge.

MS. FULLERTON: I want to clarify one thing.

REDIRECT EXAMINATION

By Ms. Fullerton:

Q. Agent Vince, you've been using this word "interview" on the 28th; did you literally ever interview Mr. Jones, that is, ask him questions about anything?

A. No, I did not. This was a conversation.

Q. In particular, you did not interview him or interrogate him regarding Hockstad Pharmacy, is that correct? * * *

WITNESS JOANNE WEINERT

(WHR 23)

A. In the Criminal Investigation Bureau, the stenographers have an office; and that's generally where we take statements, right at my desk.

Q. And how do you take a statement?

A. In shorthand.

Q. Was anybody else present besides Darby and Jones?

A. No, other than myself.

Q. Now, did you observe Mr. Jones' condition on this particular April evening?

A. Yes.

Q. Did you notice anything unusual about him?

A. No.

Q. Did he appear to you to be in any physical pain?

A. No.

Q. At any time while you were present, did you hear any kind of threats made to this defendant?

A. No.

Q. Did you have any difficulty understanding his answers to the questions put to him by Sergeant Darby?

A. Well, not difficulty in understanding him other than he talked quite a bit in phrases; didn't finish his sentences sometimes; would start to say something and he would go back a little bit and say, "The pharmacy this," and "I that—" and not complete the sentence; so that that does reflect when you read the statement or look through it. (WHR 24) And he does have words—instead of using a word like "apprehend", he would use "comprehend". But, I took down exactly what I heard from him.

Q. From anything you observed about him, did you believe he had any trouble understanding the English language?

A. No.

Q. And you didn't observe anything unusual about his health, is that correct?

A. No.

Testimony of Joanne Weinert

Q. Okay. I have an item marked as People's Proposed Exhibit Number 1. I'd like you to have an opportunity to look at it.

A. Do you have any original notes, my original statement?

Yes, this is a copy of the statement that I took.

Q. Okay. Did you personally type up, then, from your notes—

A. Yes.

Q. —a statement, is that correct?

A. Yes.

Q. And what I have handed you, Proposed Exhibit Number 1, is a copy of that, is that correct?

A. Right. It's not a very good copy. * * *

Testimony of Elbert Darby

WITNESS ELBERT DARBY

(WHR 29)

Q. How long have you been employed with the Flint Police?

A. Sixteen years.

Q. And were you so employed on Friday, April 28th, 1978?

A. Yes, I was.

Q. On that particular day, did you have occasion to meet one Jesse James Jones, Jr.?

A. Yes, I did.

Q. And what time was that, sir?

A. Approximately 1:30 in the afternoon.

Q. Is the person that you met on that date here in the courtroom?

A. Yes, he is.

Q. And would you point him out, please.

A. He's the black gentleman at the counsel table with the multi-colored shirt on, next to Mr. Neithercut.

MS. FULLERTON: Your Honor, I would like the record to reflect the identification by Sergeant Darby.

THE COURT: Surely.

Q. (By Ms. Fullerton, continuing:) Now, Sergeant Darby, how did you happen to have occasion to meet Mr. Jones on this date?

A. He was under arrest at the time on a couple of charges, Carrying a Concealed Weapons and also with violation (WHR 30) of Federal Firearms Act; and the complaint was assigned to me.

Q. And when the—when a complaint is assigned to you, what would you normally do about that, to start?

A. Read the officer's reports, look at the complaint and then talk to the person who is under arrest.

Q. And, in fact, did you have occasion on that date to discuss with Mr. Jones the charges—the Carrying a Concealed Weapon and the Federal Firearms charge?

A. Yes, I did.

Q. And prior to discussing those matters with him, did you advise him of his constitutional rights according to the Miranda decision?

A. Yes, I did.

Q. And in what manner did you accomplish this particular advice of rights?

A. I read the Miranda Warning card that has certain steps that are laid out in the cards issued by the police department. I read each individual right to him.

Q. And did you have the card today?

A. Yes, I do.

Q. Okay. Will you please indicate to the Court and the record at this time what you said to Mr. Jones regarding his rights?

THE COURT: Would the best record be the (WHR 31) statement itself, since apparently it was taken down verbatim what he said then?

MS. FULLERTON: I believe the record will show, your Honor, there were two statements, an informal and a formal.

THE COURT: Okay.

THE WITNESS: I advised Mr. Jones of the following—

Q. (By Ms. Fullerton, continuing:) And would you also indicate, Sergeant Darby, if anything, what he said to you when you advised him pertaining to each right?

S. Yes. "You have the right to remain silent. Do you understand this?"

And he replied "Yes.".

"Anything you say can and will be used against you in a court of law. Do you understand this?"

And he replied "Yes".

"You have the right to talk with an attorney before making any statements. Do you understand this?"

He replied "Yes".

If you do not have the money to hire an attorney, one will be appointed for you and you have the right to remain silent until this attorney is present. Do you understand this?"

And he replied "Yes".

"If you decide to discuss this, you can stop the interview at any time you wish. Do you understand this?"

And he replied "Yes".

"Do you wish to waive your right to have an attorney present and discuss this matter?"

And he indicated that he wanted to talk about the charges against him.

Q. And did he, in fact, then discuss with you any matters pertaining to the firearm?

A. Yes.

Q. About how long a discussion was this that you had with Mr. Jones, in particular, relating to the firearm charges?

A. Approximately forty-five minutes, maybe a little longer.

Q. And where exactly were you when you had this interview with Mr. Jones?

A. It was in my office at the Criminal Investigation Bureau. * * *

Q. Did you notice anything unusual or upsetting about * * * (WHR 34) I asked him if he—if he wanted to discuss that particular crime with me. And I readvised him he was still under the Miranda Warning rights, and he said he'd be more than willing to discuss that homicide, or any other homicide with me, because he didn't know anything about them.

Q. Okay. And then what happened, if anything?

A. We continued to talk some more about pertaining to the charges against him that he was presently incarcerated for, on the firearms, C.C.W., Carry a Concealed Weapon.

We talked some more concerning those charges, and he asked me what the penalty was for the Concealed Weapons and the other charges. And, I explained to him that the Federal Firearms was a ten-year felony violation, and Carrying a Concealed Weapon was a five-year violation.

And, he also asked me about his parole violation, and I said I believe that probably—probably he would get some time for his parole violation.

He then asked me what I could do to give him consideration if he was to tell me certain things about the Hockstad homicide.

Q. Okay. What did you do when he asked you that question?

A. I told him that if he was only going to tell me (WHR 35) certain things pertaining to people that he heard on the street, that probably there's nothing that I could do for him at all, or any consideration.

I told him that it was really out of my hands; and before I could give him any kind of consideration, I had to contact the Prosecutor's Office, depending on what he wanted to tell me.

He then indicated that he knew a great deal regarding the Hockstad's, and that he could clear up the case. At that time, I went to the telephone, contaced the Prosecuting Attorney's Office and talked to Assistant Prosecutor, John McGraw.

And, I explained the facts of the case to John McGraw, and I asked Mr. McGraw if the Prosecutor's Office could give this subject any consideration at all if he was going to give us a statement pertaining to that.

He told me at that time that if Mr. Jones was going to give a statement, and he was going to implicate himself and he would testify against anybody else that was involved, that there was a very real possibility that we could let him plead to the charge of Manslaughter. * * *

(WHR 37)

* * *

So myself and Joe Vince went back into my office, and I introduced Mr. Vince to Mr. Jones; and Joe Vince explained to Mr. Jones that—what the Federal Firearms Act was, a ten-year felony; and he said that he would

contact the U.S. Attorney regarding possible consideration pertaining to the Federal Firearms Act.

Q. Consideration if what?

A. If he was going to give us a statement regarding the Hockstad's.

Q. And what happened then, if anything?

A. Joe—He explained it to Jesse, and Jesse seemed to agree with it.

Q. With what?

A. With what Mr. Vince was saying.

Q. What was that? Let's be specific.

A. He—I don't know the exact wording, but he stated that—he explained the Federal Firearms charges to him; that they were a ten-year felony. And, Joe Vince told him that—he says, "I can't give you any promises of any kind at this time"; but, he says, "I am in a position to contact the U.S. Attorney," I believe he said, "at a later date; and he could probably give you consideration for—in exchange for the statement that you were going to give Sergeant Darby pertaining to the Hockstad's."

(WHR 38)

Mr. Vince then left the office.

Q. What time was it when Mr. Vince left, if you know?

A. It was shortly after he came in; maybe 3:00 o'clock.

Q. Do you have any notes that would accurately reflect the time?

A. I have got notes, yes.

Okay. I've got approximately four pages of notes here, and what they indicate is the initial time that I talked with Mr. Jones was 1:48 P.M.

It—The statement is ended at 5:20 P.M. That's the entire statement. As far as the breakdown of when I started initially talking to him about specific things, I don't have that.

Q. What was the time it ended, I'm sorry?

A. Five-twenty P.M.

Q. So you can say with certainty that it wasn't before 5:20 P.M., is that correct?

A. Yes.

Q. After then, Mr. Vince left, what happened?

A. I readvised Mr. Jones of his Miranda rights.

Q. And, would you tell us, how did you do that?

A. I took my Miranda card out and I advised him of the following: "You have the right to remain silent. Do you understand this?"

(WHR 39)

And he replied "Yes".

"Anything you say can and will be used against you in a court of law. Do you understand this?"

And he replied, "Yes".

"You have the right to talk with an attorney before making any statements. Do you understand this?"

And he replied "Yes".

"If you do not have the money to hire an attorney, one will be appointed for you and you have the right to remain silent until this attorney is present. Do you understand this?"

He replied "Yes".

"If you decide to discuss this, you may stop the interview at any time you wish. Do you understand this?"

And he replied "Yes".

"Do you wish to waive your right to have an attorney present and discuss this matter?"

And, he said he wanted to talk about it without an attorney.

Q. Before you had advised him of these rights, did you discuss with him what Mr. McGraw had said?

A. Yes, I did.

Q. And what, if anything, did you tell him about the (WHR 40) conversation you had with Mr. McGraw?

A. I told Mr. Jones that I had conferred with Mr. McGraw, and Mr. McGraw stated that Mr. Jones was to give us a statement implicating himself in Hockstad's, that in exchange for the statement and in exchange for his

testimony in a court of law against the other people involved, that we would allow him to plead to the crime of Manslaughter.

Q. All right. Now, I assume—maybe I misunderstood or didn't hear it—but the statement was to implicate himself, isn't that correct?

A. Yes.

Q. All right. Then, in fact, did Mr. Jones give you a statement regarding the matter of Hockstad Pharmacy?

A. Yes, he did.

Q. And who was present during this period of time, if anybody?

A. Just myself and Mr. Jones.

Q. And what—in what way was this particular statement recorded, if it was?

A. Handwritten notes.

Q. And that was by you personally?

A. Yes.

Q. And you have those notes here today, is that correct?

A. Yes.

(WHR 41)

Q. And did he, in fact, give a statement implicating himself and others in the matter of Hockstad Pharmacy?

A. Yes, he did.

Q. And that concluded, I believe you said, at 5:20; is that correct?

A. Yes.

Q. And then what happened, if anything?

A. I contacted the police stenographer, Joanne Weinert, and she came in. She was not on duty at the time, and she came in from home. We went back into her office, and I took a formal statement, with her transcribing the statement pertaining to the same statement he had just previously given me in my office.

Q. And have you had occasion to, in fact, see a typewritten transcript of the statement that was taken by you with Miss Weinert assisting?

A. Yes, I did; I have.

Q. You have seen it.

A. Yes.

Q. And I'd like you to look at Proposed Exhibit 1. Can you identify what that item is, sir?

A. Yes. This is the statement that we took in Miss Weinert's office and she was the stenographer.

MS. FULLERTON: And at this time, the People would move this particular statement into evidence.

(WHR 42)

THE COURT: Any objection?

MR. NEITHERCUT: No objection.

MS. FULLERTON: I have a copy for you.

THE COURT: Did you say no objection?

MR. NEITHERCUT: Into evidence right now, no, Judge.

THE COURT: Okay. Just wanted to hear what you said.

(Whereupon, said article marked as People's Proposed Exhibit Number 1, was received in evidence.)

MS. FULLERTON: I have no further questions.

CROSS EXAMINATION

By Mr. Neithercut:

Q. Sergeant Darby, I could be wrong, but my impression was that you only conducted one interview with Jesse Jones; is that true?

A. No. There was two interviews.

Q. You had two interviews. Were these two the same day?

A. Yes.

Q. When was the first one?

A. It started about 1:48 P.M. in my office.

Q. And when did the second one begin?

A. It is on the formal statement, I believe; it is * * *

Testimony of Elbert Darby

(WHR 45)

* * *

Q. Well, did you discuss Jesse's family?

A. No.

Q. Did you tell him you knew anybody in the family?

A. No.

Q. Do you know anybody in Jesse's family?

A. I have met his mother.

Q. Did you discuss Jesse's past?

A. We did go into the fact that I knew he was on parole for, you know, a crime. At the time, I knew that for quite some time. So, I did discuss his parole, yes.

Q. Did you know Jesse before this interview?

A. Not personally, no.

Q. You'd never met him before that?

A. No.

Q. How was it that you knew his mother?

A. While he was in the office giving me a statement, he wanted to know if he could make a phone call. And, I asked him who he wanted to call, and he said he wanted to call his mother. He called his mother on the telephone.

Q. He called his mother, or you called his mother?

A. He called his mother; talked to his mother for some time. And, he asked me if I would go by his mother's house and talk to her, and explain what he had told me; and I said I would.

* * *

(WHR 47)

* * *

Q. And did he cry after he put the phone down?

A. Yes, he did.

Q. What did you ask him to do after he got done with the telephone conversation?

A. I don't recall.

Q. Well, what did you do when he put down the telephone?

A. I believe he wanted some cigarettes, as I remember, and I think I bought him a pack of cigarettes.

Q. And then after you bought the package of cigarettes, then what did you do?

A. I told him that the stenographer was on her way in and we were going to do a formal statement.

Q. Why was it that you were going to do a formal statement then, had he told you he was going to give you some kind of a statement then?

A. He had already given me a statement.

Q. Now, at any time during the interview, did Mr. Jones ask to terminate the interview and be returned to his cell?

A. No.

Q. Never once?

A. Never once.

* * *

(WHR 49)

A. I probably just said something like "I see you've been arrested before and you're on parole". That's just—I explain who I am and I look over their record.

Q. May I see your Miranda card, please.

Thank you. Is this the card that you used during your interview of Mr. Jones?

A. Yes, it is.

Q. You didn't use a different one, did you?

A. No, I didn't.

Q. After you returned from your telephone call with Prosecutor McGraw, did you tell Mr. Jones—is that the time that you told him he could plead to a reduced charge of Manslaughter if he made an implicating statement?

A. That's the time I told him, yes, sir.

Q. Now this statement that he made in front of the stenographer, that was based upon the notes of your earlier conversations, is that true?

A. Yes, we used the informal statement as a pattern to follow, yes.

Q. And did you occasionally show the notes to Mr. Jones to assist him in an answer?

Did he ever read off your notes or anything like that?

A. No.

Q. Did he have an opportunity to see your notes?

(WHR 50)

A. He saw me writing the notes. He never took the notes and looked at them or read them or anything like that.

Q. Never at any time did he read your notes?

A. Not to my knowledge; I don't think so.

Q. Did you ask him to read your notes just to know if that was what, in fact, he wished to say to the stenographer?

A. No.

Q. Now, earlier you said something about special agent Vince. Apparently you called him for some reason or other—I guess to ask him if he could make some sort of consideration for testimony—Is that true?

A. Basically I—I wanted to make sure that we were right on the charges for violation of Federal Firearms. He's a federal officer, and I thought he could better explain the law on it.

Q. Once he explained that to you, why did he offer to come over to your interview?

A. I believe I asked him to come over.

Q. Why did you ask him to come over?

A. I felt at the time that I might want—possibly want him to explain the federal charges to Mr. Jones, seeing as how he was a federal officer.

Q. And that's what you were thinking at the time of the telephone conversation?

A. I think so, yes.

* * *

(WHR 53)

* * *

A. It would be prior to—it would be after 5:20 P.M. and prior to 6:15 P.M.

Q. Now, you indicated that he was crying during this conversation and afterwards; is that correct?

A. Yes.

Q. Had you noticed anything else before that, or during this whole afternoon, unusual about his health or emotional state?

A. No.

Q. Did he appear to be in good health to you?

A. Yes.

Q. And was he able to talk in a way that you could understand him?

A. Yes.

Q. Was he able to walk without any assistance from your office into Mrs. Weinert's office?

A. Yes.

Q. At any time, did you make any threats to him on this particular day, April 28th, 1978?

A. No.

Q. And, I'd like to ask you also, when you talked to Special Agent Vince, Sergeant Darby, did you also ask him about any consideration for Mr. Jones on the firearms charges?

A. Yes, I did.

(WHR 54)

Q. And so that was something in addition to the law that you wanted to know from Special Agent Vince?

A. Yes.

Q. And why was it that you had to ask Mr. Vince about that?

A. I believed that he'd be prosecuted under the federal laws, if not the state laws, and I felt that I would need the federal officers' help or consideration.

Q. How did you happen to even be discussing any consideration for Mr. Jones?

A. I contacted Sergeant—Excuse me—Assistant Prosecutor John McGraw--

Q. Why, at all, did you discuss any consideration for Mr. Jones?

A. Because he asked me what consideration he could get on the present charges against him, on the Federal Firearms Act and the C.—Carrying Concealed Weapon.

MS. FULLERTON: I have no further questions.

RECROSS EXAMINATION

By Mr. Neithercut:

Q. Sergeant, you've been working on this case for quite some time, haven't you?

A. Yes, I have.

Q. You were pretty anxious to crack it, weren't you?

A. Yes.

* * *

Testimony of Jesse James Jones

(WHR 56)

* * *

WITNESS DEFENDANT—JESSE JAMES JONES

JESSE JAMES JONES, the Defendant herein, called as a witness on his own behalf, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. NEITHERCUT:

MS. FULLTERTON: I think Sergeant Darby's allowed to stay at this point, is that right?

THE COURT: Yes, he can stay now.

You have no objection, do you, Mr. Neithercut?

(WHR 57)

MR. NEITHERCUT: No, your Honor.

Q. (By Mr. Neithercut:) Mr. Jones, would you—Well, why don't we start out by stating your name for the record.

A. Jesse James Jones.

Q. Thank you, Mr. Jones.

Do you recall meeting with the police on April 27th, 1978?

A. I do recall that was the day I was picked up for C.C.W.

Q. And, had you met with Sergeant Darby later on that day, after you were picked up for the C.C.W.?

A. To recall, honestly speaking—I was called out earlier—I mean later that evening after I talked with—I don't know whether it was a sergeant, I couldn't recall—an officer about the C.C.W. I was called out after that that same day, and my knowledge of not knowing really why after I'd been questioned about the C.C.W. I was called out to talk to the Sergeant Darby.

Q. On that Thursday that you were arrested, you spoke with Sergeant Darby?

A. It was that Thursday, right.

Q. And what did you talk with Sergeant Darby about on that Thursday?

A. It was about the charge that I was picked up and booked on, C.C.W.

(WHR 58)

Q. About the gun charge?

A. Right.

Q. Did he explain your rights to you when he had the conversation about the gun charge?

A. He did explain my rights.

Q. It was on that Thursday?

A. Uh-huh.

Q. And at that time, did he discuss a Hockstad attempted robbery and murder?

A. No, he did not.

Q. Did you have an occasion to discuss that with Sergeant Darby at a later date?

A. I did.

Q. Can you tell me when it was that you spoke with Sergeant Darby about that?

A. It was on the Friday. I was called out again.

Q. Was that the next day?

A. Right, it was the following day. I was called out that Friday; and he told me—the officer that came down to pick me up, take me out of my cell, told me I was going back down to talk with Sergeant Darby.

And, I was taken up to his office; and I entered his office, and he asked me to have a seat, you know, without—you know, not really knowing the reason why I had been talking to him about the C.C.W. I was just curious (WHR 59) why I was being called back out.

Q. And did you learn why you were being called back out?

A. I did, yes.

Q. Well, what was it that you discussed then?

A. When I entered his office, he offered me—he asked me to sit down; and he stated that bluntly that he had been waiting for me to come down there; and then, like saying—like the way it was explained to me, you know, for reasons of some type of a charge, you know,me bringing it upon myself, that he had to wait for me to come down there.

Q. You mean like he'd been waiting for five minutes, or he'd been waiting forever?

A. Saying for a certain amount of time, saying like to be arrested for something, you know. He just stated that he had been waiting for me, and I was puzzled, and—

Q. So it's like he had been awaiting to arrest you for several months, is that what he meant?

A. He was saying a period of time, right; that is right. And he stated that I was the only one that—well, could help him clear his case up, or a case up.

Q. What case was that?

A. He asked me was I familiar with a incident, a murder incident that had taken place on Pierson Road and Clio Road; and I stated to him that I didn't. And, he (WHR 60) stated to me that—Well, first, he went off into asking me where I had lived, where did I—where was I presently living at the time of the incident. And, he brought the date up back all the way back to "77, of December, and asked me was I familiar with some names that he called off.

Q. What were those names?

A. He called off Sam Brandon—a Sam Brandon, Andrew Wise, Ervin Wise—I guess mistakenly he said Ervin Jones when he questioned me about it—Larry Jones and a Sterling Jones.

Q. And, just let me disgress for a minute: Did he ask you that day also about the gun charges again?

A. No, he did not.

Q. To your recollection, the whole conversation was about this Hockstad Pharmacy matter?

A. Bringing it to my attention, right.

Q. And was this a—would you say this was a friendly interview, or would you say it was a hostile interview?

A. It was a—more on a hostile interview?

Q. Would you say that it kind of—was it hostile all the time, or was it kind of back and forth sort of thing; hostile sometimes, friendly other times?

A. I could—Not possibly have been, you know, friendly, you know, the way that he was directing his questions towards me, the questions.

(WHR 61)

Q. He was directing unfriendly questions to you, then?

A. Questions that, you know—stating questions that—he would ask me with me not having any knowledge of, and me plainly stating to him that I didn't.

Then him cutting me off at certain things; that he would talk about hisself, saying, like, certain information that he had on me as far as people that have given him statements about him saying that me being involved with that particular crime.

Q. So, if I could backtrack, just so I can understand what you said—If he asked you about something, and you said you didn't know anything about it, he would cut you off in anger?

A. More saying, like—like saying that I'm a liar. I'm just bluntly, you know, a liar.

Q. Did he tell you you were a liar, or did he just cut you off in anger?

A. In so many words, yes, he did say I was a liar.

Q. And—Well, just to speak bluntly, did he make any threats to you?

A. No. He'd get off into talking about that incident. He went through it as far as asking me about where I lived the time of December '77; and I explained to him approximately where I lived.

(WHR 62)

He asked me about those certain names that he brought up—names that I stated—and he went as far as carrying on this conversation and telling me that I was the only one that could help him with the case and clear that—and to clear that particular case up.

Q. Did he—Well, let me ask you this: Did you know Sergeant Darby before these particular interviews?

A. Yes, I'm familiar with Sergeant Darby, very familiar with him.

Q. Did he ever arrest you before for any other incident?

A. Some years ago, I have been stopped by he; and he have—I don't know whether he was assigned to certain cases, you know, that my brother had—my brothers have had in the past.

Q. Did he talk to you about your brothers?

A. Yeah, he mentioned about—He only stated that my previous record, as far as the type of individual I—that I am, you know; that as far as him stating, bringing me over to court, just taking me to court and just putting this charge on me, this particular charge here, by me not cooperating with him and having no knowledge of it—and stating, you know, like, who would more or less, you know, word be accepted as far as him just taking me into court and putting this particular charge on me.

(WHR 63)

And, I would ask him—you know, so much that went on in there about me being depressed at the time that I was—

Q. Well, let me back up for a minute before you get into that. So, in other words, he basically told you that with your prior record, that you'd be in trouble with the court for lying, or getting in trouble, or something like that?

Is that what he told you?

A. Would you repeat yourself.

Q. Did he say something like your prior record was going to hurt you in court?

A. Well, he just stated it toward me; that is, saying, like, for me not cooperating with him with questions that he was directing toward me, you know, concerning this charge that he had that he put on me—like, he said that he was going to take me—you know, take me to court for it. And, when I went to court, you know, I was charged with the charge.

THE COURT: What charge?

THE WITNESS: For Murder One. He told me it was Murder One. And, by me having not cooperating with him—and he felt that I had some knowledge of this particular case; but with him having certain statements from different individuals now—Right.

(WHR 64)

Q. (By Mr. Neithercut, continuing:) Let me—Wait a minute.

Why did he bring up your family to you? Did he bring up your family to you?

A. Why, sure. He had—He didn't actually go off into detail as far as saying in the past to just talk to me, in the way of saying what we actually did, but he brought it up in saying—like, him having the knowledge of going through—and I know, you know, from knowing him in the past, you know, just bringing it up about my past as far as me having a record, as far as me having did time in prison, knowing some of my brothers have done time in prison, and actually in the past of how we wish to come in commune with, you know, officers of the law—in general saying, like, troubles that we would, you know, involve ourselves in within the city.

Q. So, in other words, he explained to you about how you were supposedly a troublemaker, and how your family was that way, too?

Is that what he did?

A. Well, my brothers and my cousins, right; individually only one.

Q. Did you notice anything interesting about Sergeant Darby's desk that day?

A. He had a stack of files on his desk.

(WHR 65)

Q. What did you notice about those files?

A. They was open. It was one particular one open; and as far as to look into the file, I couldn't honestly say whose particular file it was. But, it was a picture there, and it happened to be a picture of my cousin, you know; and the files that he had on his desk, you know, eventually by him questioning me—and asked me of the people, did I have knowledge with knowing the ones that I stated—and he did have my cousin's picture there.

Q. What was your cousin's name?

A. Andrew Wise.

Q. This the same Andrew Wise that he—I don't remember; he either said he did not know him, or he said he'd heard of him someplace—Is this the same Andrew Wise, you think?

A. He say he didn't recall knowing the individual that particular day he had a stack of files on his desk, and he had my cousin's picture out; because I picked it up and I asked him a question, you know, what, you know, reason did he have this particular picture out.

But he didn't give me any, you know—he just didn't state anything.

Q. Okay. Now, tell me about your particular condition when you had been arrested. Were you happy about this arrest?

A. No, I was not happy. I was sad, depressed, you (WHR 66) know, my own point, you know, of being that way, you know, from personal reasons, you know, concerning my family.

Q. Okay. Why were you depressed, then?

A. From knowing what, you know—like being out the other time I have, and seeing what I involved myself in,

and my physical—my mother, you know, actually her condition as far as being physically—

Q. What's your mother's condition?

A. She's a—she have asthma, and she have heart troubles, you know; like she have had a heart attack.

Q. She's suffered—

A. Just last year, you know; it's just her condition, you know.

Q. Had she suffered from those problems shortly before your arrest?

A. She had suffered from it since I have been in here.

Q. Before and afterwards?

A. Uh-huh.

Q. And do you feel that Sergeant Darby took advantage of your depression?

A. I know for a fact that he did.

Q. What is it that he did that took advantage of your depression?

A. From the day—this Friday that I come in there, he showed me the statements that he had sit there and wrote (WHR 67) himself, that I was supposed to given to him, the same statement that I did relate to the lady; and seeing that I wouldn't cooperate with him, I read it; and I made statements in telling him how I felt about him, you know, as far as being an officer and the honesty about hisself.

And, he stated by me not cooperating, that I would come to court for this, anyway; he would bring me into court and be charged for this particular charge, even though I wouldn't cooperate with him, and me having no knowledge of it. And, the fact that he—what he actually did when I was taken to court over in the city.

Q. At any time during this interview, did you break down and cry?

A. Right, I did, because he was just—he kept, you know, he was just jabbing at me, and stating that he had, you know, a feeling that I did have knowledge of this particular crime.

You know, he jabbed at me, and jabbed at me; and, you know, just actually what I went through as far as being over at the City Jail, you know, that Friday. And, he just constantly asked me questions and offered me a 15-year cop, and him stating me asking him of giving a statement and not having knowledge of certain things I have knowledge of myself personally, you know, with me having knowledge of—you know, me not ever asking him a question of how much that (WHR 68) I could get for the charge that I arrested for.

In fact, I already knew it myself, how much time that it carried.

Q. You did not ask what the time was, then?

A. No, I never asked him. He stated that—I asked him voluntarily, I would cooperate with him; and at no time I ever stated anything of that nature of cooperating with him, and it was his doing of the way he would go about asking me questions and offering me different things; like, he would offer me a 15-year cop to a manslaughter to come in and testify to against John Hamilton. And, you know, he would offer me a 15-year cop; and told me that C.C.W. charge would be dismissed.

And, later, I read it in the paper, you know, just as he said he was going to do; he actually did it.

Q. Did he threaten you with the time that you'd do if you didn't go along with this?

A. He just told me—what he stated was me not cooperating with him, and it being bound over that way, the people who—word would be, you know, accepted as far as the type of individual I am, being a ex-con—this is all, you know. The way that I seen him, you know, like the way of jabbing at me and trying to help him clear up the case, that I constantly tell him I don't know anything about.

Q. Do you remember when he had a third individual (WHR 69) come into the interview room?

A. It was after I had made a phone call. He let me call my mother, and I talked with my mother; and he stated

that—he excused hisself, and it was—I think it was a district attorney came in. And, I don't know; it was like a game. It was a district attorney came in.

Q. Was this—Excuse me—Was this district attorney the gentleman that you saw today who we've no learned is a federal agent?

A. I believe it was he.

Q. At the time you thought he was a district attorney, though?

A. Right. It was stated—it was stated to me it was a district attorney coming in in favor of—saying Sergeant Darby. Like, I was going to confess and give, you know, a statement; and the fellow did come in and he seated hisself.

Q. And what happened then, when he came in?

A. Nothing happened. I just sit there, and Sergeant Darby made a statement such as I wanted to make, the full statement, just with me and him being alone.

Q. So you didn't say anything in front of his agent Vince who you thought was a district attorney?

A. No, I did not. That's what was stated to me, that a DA was coming in; and, like to—for me to just sit there like I was going to give him a statement, you know.

(WHR 70)

Q. So he wanted you to give a statement in front of this person?

A. Right.

Q. That you thought was a DA?

A. Right.

Q. Do you recall, did he explain to you—I'll withdraw that.

At any time during this interview, did you ask to be returned to your cell?

A. I did.

Q. What was Sergeant Darby's response to that?

A. Like a person would get somewhat of an attitude, you know.

Q. What do you mean by an attitude?

A. Like, when I was—for me to disagree with what you're saying and not to go along with it; and it's something that you really want, and it would be me, like, you know, saying like he stated for me, not cooperating with him; and so he got very offensive.

Q. Let me go back. Did you ask him to return you to your cell?

A. I did.

Q. And did he say he would?

A. He asked me to go and make a statement, to read off the statement, the same one that he would let me see. (WHR 71) He shown me—

Q. So, in other words, he told you you could return to your cell if you read off this statement?

A. In front of that particular lady.

Q. Is that what he said?

A. No, he didn't state it. He asked me would I more or less do him a favor; and I told him, you know, not saying in words but within myself, just for him to leave me alone. I said I would read the statement, the statement that he had sit there and wrote himself that particular Thursday.

Q. And you read—Repeat for the Court again why it was you read that statement.

A. Why it was he read it?

Q. Why it was you read it?

A. Why I read it?

Q. Yes.

A. For him to just leave me alone.

Q. So he'd been—Why did you want him to leave you alone? What had he been doing to you?

A. Because, you know, it was like he didn't have any feelings, you know. Like he stated that, you know, like, for a person to feel depressed within hisself, and here's a person constantly, you know, like jabbing at me, you know, and trying to get me to help him do something that, you know, I can't do it. You know, there is no way I can do it.

And, (WHR 72) I simply just told him yes, you know, right before I asked him to go to my cell. And, he asked me to go over in the next room, over—it was the lady that was here—and asked me to read off that particular statement.

Q. You just did that because you wanted to be relieved of him?

A. Yes.

Q. Now, did you—Can you tell me exactly how you made that statement?

A. The statement that was made?

Q. Before the lady.

A. I sit there at her desk, and Sergeant Darby sat in front of me with a long sheet of paper, like that yellow sheet there; and he would ask me a question, and I would related it, you know; and asked me to just relate it, just go over it and just read it off, you know, from my mind, just as I had read it. And, I did so, as much as I possibly could—She would stop me, you know, as far as a pause, and would take me back saying whatever I would—it wouldn't be on that particular paper.

And, Sergeant Darby would make statement, you know, saying, like, whatever that I would get confused with. As far as what I don't—what I wouldn't recall on that paper, he would bring it to my attention, and I would go back over it.

* * *

(WHR 73)

And she would continue to write it, you know, as I just sit there, you know, and read it off. From me reading the first time—

Q. So, in other words, what you're basically saying is Sergeant Darby prepared a statement and you read it out loud for the lady?

A. Right; right. Because I had asked him, right—I had asked him in his office—I would sit there, and I asked him to be taken back to my room. And, he asked me to read that statement off. He asked me would I read it, and I told him yes, I would read it.

I didn't have no knowledge as far as it affecting me; and for him to—just knowing that he would bring me to court for his case here, you know, and me telling him, and whatnot, it was just, you know—I was just confused, and seeing actually what he was doing.

Q. Mr. Jones, is there anything else you want to tell the Court about this statement?

A. No.

MR. NEITHERCUT: Okay. I have no further questions right now, Judge.

THE COURT: Okay.

MR. NEITHERCUT: Ms. Fullerton.

* * *

(WHR 82)

* * *

Q. And you understood those rights, did you not?

A. As far as C.C.W.

Q. As far as the Miranda rights go, you understood those rights?

A. As I understood the rights that he had read off to me that Thursday, yes, I understood them.

Q. And you understood the rights on Friday when they were read to you again?

A. He never wrote any—he never asked me about any rights that Friday, or anything of the nature that Friday.

Q. He didn't take out his card and read to you your rights, is that what you're telling me?

A. No, he did not take out no card and read me no rights.

Q. Let me ask you this, Mr. Jones: Did you give him a statement about your involvement in the Hockstad Pharmacy?

A. No, I did not give him a statement.

Q. And when you got in there with Mrs. Weinert then later about 6:30 in the evening, in her office, you didn't give her a statement, either?

A. I stated that Friday, when I asked him to take me back to my cell, when he had jabbed at me, he asked me would I do—more or less he asked me would I do something for him, and he asked me would I read off that particular paper that he had wrote on; he asked me would I read it to a lady.

(WHR 83)

Q. And you sat there and read a statement to this lady?

A. No, I didn't sit there and read it. I was taken over to another room; and, yes, I read it.

Q. So she—

A. I read it so he would leave me alone. I read it to her.

Q. So if she said that you didn't read any statement, she's a liar; is that right?

A. If she said what?

Q. She said, right in this courtroom today—was sitting where you were—that you did not read any statement.

A. She did not say that, 'cause I sit there and read it from my head.

Q. You read it from your head?

A. Yeah, from what I had read. I told you he had let me read that Friday, okay? The same statement that he had sit there that Thursday, he talked to me about; I openly sit there and talked to him about the C.C.W. that I was picked up on. Okay. That Friday, he presented that, and he let me read it. Okay.

Q. What form was this thing that you allegedly read, Mr. Jones?

A. What form?

Q. Yes.

(WHR 84)

A. It was on a long white sheet, such as that. (Indicating)

Q. Long yellow paper with blue ink?

A. Right; right.

Q. And you read that?

A. I read it—I didn't go—I wasn't reading off the paper when he had—when I told him that I would do that for him, do that for him so that he could just leave me alone about asking me certain things I had no knowledge of.

I went in that room where the lady was, and I sit in that chair; and Sergeant Darby held the paper hisself in front of me.

Q. He held it in front of your nose so you could see the answers?

A. No, no, no, no. He sit there hold'ng it hisself like this. (Indicating)

Q. Holding it up so you could read it?

A. No. He was holding it, too, and the paper—the lettering was facing him. I was sitting at the desk next to the lady.

Q. You couldn't read what was on the paper that he had in front of him, could you?

A. No, no, no, no. I say Sergeant Darby let me read it.

Q. Before.

(WHR 85)

A. Right, he let me read it that Friday.

Q. You didn't have that in front of you when Ms. Weinert was taking your statement.

A. No. Sergeant Darby had it in front of him.

Q. Fine. But you didn't.

A. I didn't need after reading it once. I didn't need it because I told him he was crazy.

Q. You did?

A. Yeah, I told him he was crazy. You know, it's not something nice to say about a person, but I stated it to him.

Q. In front of Mrs. Weinert?

A. No, I stated to Mr. Darby when he and I was in his office alone, because it is the same as him saying he brought—when he actually brought a person, a fellow man,

in there as though that I had made the statement. And, I stated that the fellow had sit there when I wouldn't say anything, and Sergeant Darby stated that on me, that I wanted to make the statement, why him and me was alone.

Q. But then there did come a time when you went in a room with Mrs. Weinert and Sergeant Darby and he asked you questions and you answered questions.

A. Right—No—Right before he taken me to my cell.

Q. And she was there with her little pad, and she took it down?

A. She was writing it down.

(WHR 85)

Q. And you're telling me that the answers you gave were just things you memorized from some sheet of paper Sergeant Darby let you read?

A. Right, the same one that he have on that paper.

Q. But you didn't know anything about those answers except what Sergeant Darby had on his paper?

A. That's right.

Q. And you were just doing this as a favor to get him off your back?

A. No, I wasn't doing it as a favor. I wanted him to leave me alone, and to go in there and read off something that I have already read myself, with him fool enough to sit there and let me— and present it to me and let me read it, why shouldn't I. I just wanted him to leave me alone.

He don't have no feelings for no one as far as how did he know how I felt.

Q. I don't know how you felt, either, Mr. Jones, but that's not the question.

A. Right, right.

Q. You just did it as a favor to Sergeant Darby?

A. No, I did it as a favor myself.

Q. To yourself?

A. For myself.

Q. To get rid of this crazy sergeant.

A. That's right.

* * *